Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

No. 95 16

In The

Supreme Court of the United States

October Term, 1994

MARTIN L. MANDEL,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CAPACITY AS MANAGER OF THE FSLIC RESOLUTION FUND, STATUTORY SUCCESSOR TO FSLIC IN ITS CORPORATE CAPACITY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

NEIL A. KAPLAN
Counsel of Record
CLYDE, SNOW & SWENSON
201 South Main, Suite 1000
Salt Lake City, Utah 84111-2208
(801) 322-2516

VICTOR SIMON
KENNEDY & BARIS, L.L.P.
1225 19th Street, N.W.
Suite 710
Washington, D.C. 20036
(202) 835-0313

Attorneys for Petitioner

7018
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether, in a lawsuit brought by the Federal Deposit Insurance Corporation, as receiver of a state-chartered savings and loan association, for claims that arose prior to FIRREA, it is fundamental error to apply a special federal common law burden of proof standard to state common law fraud claims.

2. Whether an individual sued by the Federal Deposit Insurance Corporation, as receiver of a state-chartered savings and loan association, for state common law fraud claims that arose prior to FIRREA, may assert affirmative state-law defenses of contributory negligence and mitigation of damages against the Federal Deposit Insurance Corporation for its own conduct in managing and disposing of the asset at issue in the fraud claims.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Martin L. Mandel, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit in this matter.[1]

1. The sole parties to this case are reflected in the caption. In April 1985, the Federal Home Loan Bank Board appointed the Federal Savings & Loan (Cont'd)

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 38 F.3d 1119 (1994) and is reprinted in the Appendix hereto at 7a. The Judgment of the District Court of Utah, dated February 26, 1991 is unreported. Its Findings of Fact and Conclusions of Law of the same date are reprinted in the Appendix hereto at 15a.

STATEMENT OF JURISDICTION

The Tenth Circuit issued its decision on October 18, 1994. A timely petition for rehearing was denied by Order on February 1, 1995. The Order appears in the Appendix at 3a. On April 17, 1995, the time for filing this petition was extended by Justice Breyer to and including June 30, 1995. (Application No. A-94-775). This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

This case involves a twenty-two million dollar ($22,000,000.00) civil fraud judgment against Petitioner, a director of State Savings, a Utah-chartered savings and loan association, in an action brought by the FDIC as the receiver of State Savings.

(Cont'd)
Insurance Corporation ("FSLIC") as receiver of State Savings and Loan Association of Utah ("State Savings"). FSLIC, as receiver, subsequently assigned to FSLIC, in its corporate capacity, among other things, all claims of State Savings against its former directors, officers, controlling persons, employees and shareholders. Pursuant to Section 215 of The Federal Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, all assets of the FSLIC were transferred to the FSLIC Resolution Fund. The FDIC in its capacity as manager of the FSLIC Resolution Fund was substituted as plaintiff in this case. For the sake of clarity and simplicity, we refer throughout this petition to the respondent as the FDIC.

The claim arose out of a single real estate transaction in 1984, known as the Park Glen transaction, between State Savings and another corporation controlled by State Savings' owner, J. William Oldenburg. The FDIC basically claimed that Park Glen was sold to State Savings at an inflated price in order to generate money for Oldenburg's related companies. According to the district court's findings,[2] the property was sold without full disclosure of certain facts to State Savings' only outside director, who voted to approve the transaction, and without obtaining prior federal regulatory approval as required for related-party transactions. As a member of the State Savings Board of Directors, Petitioner was found to have assisted in concealing the full facts of the transaction from the outside director and the regulators.

In arriving at its judgment on the fraud claim, the district court applied a special federal burden of proof standard (preponderance of the evidence) instead of the more stringent Utah standard (clear and convincing evidence). On this issue, the district court's Conclusion of Law No. 18 states in pertinent part:

> [T]he court rejects defendant Mandel's [Petitioner] contention that the fraud proven must be proved by clear and convincing evidence. It is sufficient if it is proved by a preponderance of the evidence and such burden has been met by plaintiff [FDIC] in this case.

Pet. App. at 67a.

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2. A detailed summary of the facts surrounding the Park Glen transaction, as found by the district court, are set out in a related appeal at *FDIC v. Oldenburg*, 34 F.3d 1529 (10th Cir. 1994).

On review by the Tenth Circuit, the Court of Appeals stated:

> [T]o the extent he [Petitioner] raised the clear and convincing standard at all, he did so in a separate and distinct context, i.e., his assertion that the FDIC's settlement with a fidelity insurer included its fraud claim against him. Because Mr. Mandel failed to raise the burden of proof issue below, we will not address it on appeal.

Pet App. at 9a.

On petition for rehearing, Petitioner asserted that the issue had been raised and in any event was an issue requiring consideration and correction for fundamental error.

In addition, the district court refused to allow Petitioner to assert certain Utah affirmative defenses, including contributory negligence and mitigation of damages, because it determined that federal common law and policy precluded assertion of state law defenses against the FDIC. With regard to this issue, the Tenth Circuit held:

> [W]hen the FDIC sues to recover on the assets of a failed financial institution, the responsible officers and directors of such institution may not assert the affirmative defenses of contributory negligence and mitigation of damages against the FDIC. The district court therefore did not abuse its discretion when it refused to permit Mr. Mandel [Petitioner] to introduce evidence of the post-receivership conduct of the FDIC in an attempt to reduce his liability for damages

> sustained as a result of the Park Glen transaction.

Pet. App. at 12a.

The Tenth Circuit affirmed the exclusion of evidence on the issue of mitigation of damages by relying on cases prior to this Court's decision in *O'Melveny & Meyers v. FDIC*, 114 S. Ct. 2048 (1994). Those pre-*O'Melveny* cases developed special federal common law rules to bar defendants from raising or proving certain defenses in suits brought by the FDIC.

The Tenth Circuit thus affirmed the district court on both the burden of proof and the affirmative defenses issues without any consideration of this Court's decision in *O'Melveny*, even though Petitioner brought *O'Melveny* to the Tenth Circuit's attention.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the Tenth Circuit ignored this Court's decision in *O'Melveny* by affirming the district court's erroneous creation and application of special federal common law on two key substantive issues: the correct burden of proof and the assertion of defenses, including mitigation of damages. Neither the district court nor the Tenth Circuit applied Utah law in this matter, as required by *O'Melveny*. In that regard, Utah law clearly provides that the appropriate burden of proof in a civil fraud matter is clear and convincing evidence. *See, e.g., Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985); *Baldwin v. Vantage Corp.*, 676 P.2d 413 (Utah 1984); *Universal C.I.T. Credit Corp. v. Sohm*, 391 P.2d 293, 294 (Utah 1964). Likewise, Utah law clearly permits a defendant to assert affirmative defenses, including mitigation of damages, in a civil fraud action. *See, e.g., Conder v. A.L. Williams & Assoc.*, 739 P.2d 634 (Utah App. 1987) and *Pratt v. Bd. of Education*, 564 P.2d 294 (Utah 1977).

The Tenth Circuit's decision is in direct conflict with this Court's decisions in *O'Melveny* and other cases which establish firmly that the burden of proof is to be determined under applicable state law when a plaintiff asserts state law causes of action. *Cities Service Co. v. Dunlap*, 308 U.S. 208 (1939); *Palmer v. Hoffman*, 318 U.S. 1092 (1943) ("the burden of establishing contributory negligence is a question of local law"). Rather than applying Utah law, as required, the Tenth Circuit allowed the district court's fundamental errors to remain uncorrected. In doing so, the Tenth Circuit failed to follow this Court's decision in *O'Melveny*, which was rendered four months before the Tenth Circuit's decision in this matter.

Under *O'Melveny* and its predecessors, the district court was required to apply Utah state law. The Tenth Circuit's opinion precluding the assertion of state law defenses to the conduct of the FDIC when it brings an action under state law conflicts with at least one other circuit. The conflict involves an issue of critical legal and practical importance — the manner in which federal courts are to address state law defenses to tort liability claims brought by the FDIC involving the FDIC's own conduct, whether as assignee of claims or as receiver of a failed institution. The Fifth Circuit has ruled directly contrary to the Tenth Circuit on this point in *FDIC v. Massingill*, 30 F.3d 601 (5th Cir. 1994). Thus, the rulings of the Tenth Circuit warrant review by this Court to determine whether the FDIC is entitled to special rules of decision on the burden of proof and the assertion of affirmative defenses which are contrary to applicable state law and are, therefore, in conflict with this Court's decision in *O'Melveny* and another Circuit court.

I.

THE TENTH CIRCUIT'S REFUSAL TO CORRECT THE DISTRICT COURT'S FUNDAMENTAL ERROR OF LAW IN APPLYING THE WRONG BURDEN OF PROOF TO THE UTAH COMMON LAW FRAUD CLAIMS REQUIRES REVIEW BY THIS COURT.

This case presents the question of whether the FDIC should have been required to prove the state common law fraud claims against Petitioner by the applicable state law standard of clear and convincing evidence in conformity with this Court's opinion in *O'Melveny* or, as the district court concluded, by a lesser federal common law standard of the preponderance of the evidence. The Tenth Circuit let the district court's judgment stand on the basis of its conclusion that Petitioner did not adequately raise the burden of proof issue below. Pet. App. 9a. The Tenth Circuit further noted that to the extent Petitioner raised the issue below, he did so in a separate and distinct context relating to the FDIC's settlement with the fidelity insurer of the failed financial institution for which Petitioner served as director.[3] As a result, the court concluded that it would not address this issue on appeal. Pet. App. 9a.

The Court of Appeals overlooked and misapprehended several important points. First, regardless of the contextual precision with which Petitioner raised the issue below, it is clear from the record that the district court considered the issue of the correct burden of proof, not once, but twice. In Conclusion of

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3. Petitioner contended in the district court that the insurance settlement settled all covered claims under the policy and, therefore, the FDIC should be required at trial to prove that Petitioner's conduct was not covered by the policy, a showing which would have required the FDIC to prove more than common-law fraud. The district court rejected that argument. *See* Conclusion of Law No. 18. Pet. App. 66a.

Law No. 4, the district court specifically rejected the application of the Utah standard of clear and convincing evidence in favor of the preponderance of the evidence standard stating: "[i]n an action such as this, fraud and conspiracy to commit fraud may be proven by a preponderance of the evidence and do not require proof by clear and convincing evidence." Pet. App. 64a.

Second, the district court considered and rejected the applicable Utah standard of clear and convincing evidence when addressing the effect, if any, of the insurance settlement on the FDIC's burden of proof. Specifically, the district court's Conclusion of Law No. 18, states, in part:

> Based thereon, the court concludes that the settlement between [the insurance company] and [the FDIC] does not bar [the FDIC's] claims against defendant Mandel based on fraud or conspiracy to defraud and relating to the Park Glen transaction. ***Moreover, the court rejects defendant Mandel's contention that the fraud proven must be proved by clear and convincing evidence. It is sufficient if it is proved by a preponderance of the evidence and such burden of proof has been met by [the FDIC] in this case.***

Pet. App. 67a (emphasis added).

The district court considered two separate issues in Conclusion of Law No. 18. The first issue was whether the FDIC's settlement with the insurer barred prosecution of the common-law fraud claims against Petitioner. The court concluded that it did not. The second issue addressed was the appropriate burden of proof for the common-law fraud claims.

On that issue, the district court clearly understood that Petitioner did assert that those claims needed to be proved by clear and convincing evidence, the appropriate standard under Utah law.

The issue of the correct burden of proof for the common-law fraud claims had nothing to do with the effect of the insurance settlement. Rather, the insurance settlement issue addressed by the district court dealt with whether the FDIC could pursue the common-law fraud claims at all, not with what burden of proof should apply to those claims. Once the district court concluded that the insurance settlement did not preclude the FDIC from pursuing the common-law fraud claims, then, and only then, was it necessary for the district court to consider the appropriate burden of proof on those claims. Thus, the district court's consideration of Petitioner's contention that fraud must be proved by the state law standard of clear and convincing evidence was specifically directed to the common-law fraud claims.

Presumably, the primary purpose of raising an issue below is to ensure that the district court, in the first instance, has considered it. Here, there is no question whether the district court considered the two different burdens of proof, *i.e.*, clear and convincing versus preponderance. Clearly, it considered both and chose the latter. Thus, the policy considerations for ordinarily requiring a party to raise an issue below were substantially met by the fact that the district court considered the issue. *See Hicks v. Gates Rubber Co.*, 928 F.2d 966, 990 (10th Cir. 1991), *quoting from Richerson v. Jones*, 572 F.2d 89, 97 (3rd Cir. 1978) (Court of Appeals considered issue on appeal where district court acknowledged existence of issue, even though party had not raised it.)

Even if the legal issue was not raised in the district court with the degree of particularity ordinarily desirable to preserve it for review, the application of the wrong burden of proof is a

fundamental error of law which will cause a grave miscarriage of justice unless corrected by this Court. A judgment of $22,000,000 plus interest is the equivalent of an economic death sentence against Petitioner and his family. As would be true of almost any individual, Petitioner is incapable of paying a material portion of the more than $2 million of yearly interest on the judgment, let alone any portion of the judgment itself.

This Court has long recognized that fundamental errors of law can and should be corrected, regardless of whether they were raised below. In *Hormel v. Helvering*, 312 U.S. 552 (1941), an issue of law not presented to the tribunal below was considered for the first time by the Court of Appeals. This Court agreed that the appellate court acted appropriately in considering the issue and set forth the rationale for doing so:

> Ordinarily, an appellate court does not give consideration to issues not raised below. For a procedural scheme contemplates that the parties shall come to issue in the trial forum vested with authority to determine questions of fact . . . . There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below . . . . *Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.* A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been

> specifically urged would be out of harmony with this policy. *Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.*

312 U.S. at 556-557.

The district court's application of an erroneous burden of proof to the Utah common-law fraud claims against Petitioner can only be classified as a fundamental error of law. There is no question that the correct state law standard for Utah common-law fraud claims is proof by clear and convincing evidence. *See Von Hake, supra*; *Baldwin, supra*; *Universal C.I.T., supra.* Indeed, the FDIC has never contended otherwise — not in the district court and not in the Tenth Circuit. Rather, the FDIC asserted for the first time on appeal that, while the standard of clear and convincing evidence would ordinarily be applied to the Utah common-law fraud claims, the FDIC was entitled to a special federal common-law burden of proof for those claims, *i.e.*, the substantially less demanding preponderance of the evidence standard.

The FDIC based its claim of right to the lesser standard of proof on an asserted need for a uniform national burden of proof. This argument was without merit or support when presented to the Tenth Circuit prior to this Court's decision in *O'Melveny.* The FDIC's argument lost any remaining vitality after this Court's unanimous decision on June 13, 1994 in *O'Melveny.*

In *O'Melveny*, this Court held that state law, rather than federal law, applied to state common-law causes of action asserted by the FDIC, as receiver for a failed institution absent the most compelling circumstances or an expressly applicable federal statutory provision. 114 S. Ct. at 2053-2054.[4] This Court

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4. Even before this Court's decision in *O'Melveny, supra*, the Tenth Circuit and other courts had recognized that state law governed common-law

(Cont'd)

expressly rejected the FDIC's argument that uniformity (federal common law) was needed to assist the FDIC's nationwide litigation of these suits. *Id.* at 2055. Specifically, this Court noted:

> Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty — but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common law" rules.

Id. at 2055 (citations omitted).

The fact that the district court did not have the benefit of the *O'Melveny* decision at the time it reached its conclusion is yet another reason why this Court should now consider and correct the fundamental error committed below. In *Hormel v. Helvering, supra,* the fact that this Court had issued a clarifying decision in another case after the lower court had ruled in *Hormel* and while the case was pending on appeal in the circuit court was one of the considerations which supported appellate review. *Hormel, supra,* 312 U.S. at 559.

Appellate courts have consistently recognized that the legal issue of the appropriate burden of proof in a civil fraud case is a fundamental one and have considered the issue whether it was

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fraud claims brought by the FDIC and confirmed that there was no national standard of liability for officers and directors on such claims. *See, e.g., FDIC v. Canfield*, 967 F.2d 443, 447 (10th Cir. 1993); *FDIC v. W.R. Grace & Co.*, 691 F. Supp. 87, 93 (N.D. Ill. 1988); *FSLIC v. Williams*, 622 F. Supp. 132, 135 (D. Md. 1985). Appellant brought these three cases to the Tenth Circuit's attention before oral argument, pursuant to Fed. R. App. P., 28(j), on April 12, 1993.

raised below or not. For example, in *Beardshall v. Minute Man Press International, Inc.*, 664 F.2d 23 (3rd Cir. 1981), the trial court erroneously instructed the jury that the plaintiffs bore the burden of proving a fraud case by a preponderance of the evidence.[5] Not only did defense counsel raise no objection to the instruction, he actually acquiesced in it. *Id.* at 25-26. The appellate court noted that ordinarily the failure to raise an issue would bar consideration of it on appeal. However, because the error related to a critical and fundamental issue resulting in plain and fundamental error, the court considered it on appeal and reversed the lower court. *Id.* at 27.

Similarly, in *Ostrov v. Metropolitan Life Insurance Co.*, 379 F.2d 829 (3rd Cir. 1967), the court reversed a judgment in which the trial court had erroneously charged the jury that the burden of proof for Pennsylvania common law fraud was a preponderance of the evidence instead of clear and satisfactory evidence. *Id.* at 837. Again, even though there was no objection and it was arguable whether plaintiff had properly raised the issue below, the court ruled that the error was so fundamental and highly prejudicial as to justify the court's review of it despite the absence of a proper objection. *Id.* at 838, n. 10. *Accord, e.g., Rata v. Lincoln National Life Insurance Co.*, 378 F.2d 209, 212 (3rd Cir. 1967) (application of the erroneous burden of proof on fraud claims was so fundamental and prejudicial as to justify the court's review despite the absence of a proper objection); *Batka v. Liberty Mutual Fire Insurance Co.*, 704 F.2d 684, 690 (3rd Cir. 1983) (application of the wrong evidentiary standard of proof on fraud claims is plain error); *Kerr v. State Farm Fire and Casualty*, 731 F.2d 227, 228-29 (4th Cir. 1984) (application of a preponderance of the evidence standard to fraud claims is plain error even without objection); *O'Brien v. Willys Motors, Inc.*, 385

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5. Under Pennsylvania's common law, like that of Utah, the fraud must be proven by clear and convincing evidence. *Beardshall, supra*, at 27.

F.2d 163, 166-67 (6th Cir. 1967) (application of wrong burden of proof on fraud claims is plain error even if not raised below). *See also, Campbell v. Bartlett*, 975 F.2d 1569, 1576-77 (10th Cir. 1992) (application of wrong burden of proof is plain error); *United States v. Lofton*, 776 F.2d 918, 922 (10th Cir. 1985) (application of wrong burden of proof is plain error).

In each of the foregoing cases, the error was known to the aggrieved party before the judgment was rendered, and relief was still granted on appeal even though the party had not objected below. In Petitioner's case it was not possible for him to have anticipated the error and preserved his claim prior to receiving the district court's written Findings of Fact and Conclusions of Law. It was in those findings and conclusions, delivered to the parties simultaneously with the court's judgment, that the district court advised the parties that it applied the preponderance of the evidence standard. *See* Conclusion of Law No. 4 and 18. Pet. App. 64a, 66a.

On that point, the Tenth Circuit's opinion states that Mr. Mandel "did not contest the district court's conclusion once it was issued." Pet. App. 9a. While Petitioner did not include this issue in his motion to vacate the judgment, under Fed. R. Civ. P. 60(b), it is well settled that such post-trial motions are not a substitute for a direct appeal. As one court has noted: "Rule 60(b) is not intended to correct errors of law made by the district court in the underlying decision which resulted in a final judgment . . . . The appropriate way to seek review of alleged legal errors is by a timely appeal; a 60(b) motion is not a substitute for an appeal . . . . " *McKnight v. United States Steel Corp.*, 726 F.2d 333, 338 (7th Cir. 1984) (citations omitted). *Accord, Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991) (arguments concerning the district court's misapplication of law are properly brought on direct appeal, not pursuant to Rule 60(b)); *Bud Brooks Trucking Co. v. Bill Hodges*

Trucking Co., 909 F.2d 1437, 1440 (10th Cir. 1991); *Greenwood Exploration, Ltd. v. Merit Gas and Oil Corp.*, 837 F.2d 423, 427 (10th Cir. 1988); *Morris v. Adams Mills Corp.*, 758 F.2d 1351, 1357-58 (10th Cir. 1985). Thus, Petitioner properly took a direct appeal to seek review of the district court's fundamental legal error.

Under *O'Melveny*, the proper burden of proof was the Utah standard of clear and convincing evidence, rather than the judicially-crafted federal common law standard of a preponderance of the evidence applied by the district court. The district court's error on this fundamental issue of law will result in a gross miscarriage of justice if the judgment is allowed to stand. Failure of this Court to review this issue will defeat the ends of justice, not promote them.

II.

THE TENTH CIRCUIT'S OPINION REGARDING THE ASSERTION OF AFFIRMATIVE DEFENSES IGNORED THIS COURT'S DECISION IN *O'MELVENY* AND HAS CREATED A CONFLICT IN THE CIRCUITS THAT MUST BE RESOLVED.

The decision of the district court against Petitioner in the amount of $22 million was based on the court's finding that the price for which the FDIC sold the real property in July of 1988 was presumptively the value of the property on March 30, 1984, the date on which State Savings purchased the property. At trial, Petitioner sought to introduce evidence on two issues with respect to the measure of damages: (1) the proper measure of damages was the difference, if any, between the consideration paid by State Savings for the property and the fair market value of the property on the date of the purchase by State Savings; (2) Petitioner raised the issue of the post receivership mishandling of

the property by the FDIC. Petitioner argued that he should not be held liable for any loss in value which resulted from the FDIC's failure to maintain the tentative tract map on the property. Petitioner intended to prove that the value of the real property with a tentative tract map entitling the owner to build over nine hundred housing units on the property was substantially greater than the value of the same real property without the right to build any housing units. When State Savings bought the property, the tentative map was in full force and effect. While State Savings was in receivership, the FDIC failed to take the minimal ministerial steps necessary to keep the tentative map in effect. The FDIC allowed the map to lapse. The district court refused to allow Petitioner to introduce any evidence as to the value of the property on the date of purchase by State Savings or the diminution in value as a result of the lapse of the tentative map by the time the FDIC sold the property. The Tenth Circuit upheld the district court's exclusion of the evidence and held that affirmative defenses were not available to Petitioner. Pet. App. 12a.

On the issue of whether a director of a savings and loan association can raise affirmative defenses against the FDIC, the Tenth Circuit's opinion has created a conflict among the circuits. The Fifth Circuit in *FDIC v. Massingill, supra*, allowed the assertion of such defenses involving the primary conduct of the FDIC in determining the issue of damages. Unlike the Tenth Circuit's decision in the instant case, the Fifth Circuit found that under *O'Melveny*, the issue was to be decided under state law.

This is an ordinary tort case in which one of the parties is the assignee of the claims of a savings and loan association, no more and no less. Clearly, if Petitioner had not been a director of State Savings, he would have been allowed to introduce evidence on the issue of mitigation of damages. Similarly, if State Savings had brought the same claim in its own behalf, Petitioner would have been entitled to introduce evidence on the issue of the amount of

the damages under Utah law. There is simply no justification for the rule crafted by the Tenth Circuit that Petitioner loses his fundamental legal rights merely because he was a director of the savings and loan or merely because the FDIC, as assignee, brought the action rather than State Savings itself.

The prohibition against the use of relevant evidence finds no support in the Federal Rules of Evidence. Under Rule 402, relevant evidence is admissible. The only limitation on the use of relevant evidence is found in Rule 403, which allows a judge to limit or prohibit the use of relevant evidence only ". . . if its probative value is substantially outweighed by the damage of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." None of these circumstances exists with respect to the post-receivership evidence in the matter before this Court. Thus, the Tenth Circuit's decision deprived Petitioner of a fundamental aspect of due process and has no basis in applicable substantive law.

Further, the Tenth Circuit's decision is in direct conflict with this Court's decision in *O'Melveny*. This Court held that in those instances where federal banking regulators bring suit as receivers based upon principles of state law, state law shall govern the claims and the defenses to those claims. Just as the district court did in the instant case, the lower court in *O'Melveny* found that it was "beyond doubt that federal, not state, law governs the application of defenses against FDIC," and the Court of Appeals declared that the equitable defense of imputed negligence was unavailable to O'Melveny. *FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 751-752 (9th Cir. 1992).

This Court disagreed with the Ninth Circuit's application of federal common law to a negligence action brought under state law and noted that when the FDIC brings suit as receiver of a

failed institution, it is placed in the shoes of the institution to work out its claims under state law. The fact that this Court intended state law to serve as the guiding authority in litigation where federal banking regulators bring suit as receivers of failed institutions is further evidenced by Justice Stevens' explanation of the Court's position:

> Because state law provides the basis for [the FDIC's claim], that law also governs both the elements of the cause of action and its defenses. Unless Congress otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law.

O'Melveny, 114 S. Ct. 2056 (Stevens, J. concurring).

As in *O'Melveny*, the receivership in this case began before passage of FIRREA. This Court analyzed the propriety of promulgating a federal common law rule both on the assumption that FIRREA did apply and then on the assumption that FIRREA did not apply. In *O'Melveny*, this Court ruled against creating a federal common law rule in each instance, but for different reasons. Because this action is not governed by FIRREA, only one part of the *O'Melveny* decision is appropriate here. Under the holding of *O'Melveny*, Petitioner was entitled to have damages determined under Utah law: the difference, if any, between the value of the property at the time of purchase by State Savings and the price actually paid at that time by State Savings.

The conclusion of the district court preventing Petitioner from introducing evidence on the true value of the property went beyond the mere striking of a defense and presumed the issue of proximate cause. Under Utah law, a person sued for civil fraud is responsible only for the damages proximately related to the

alleged fraud. The Tenth Circuit's decision in this case makes Petitioner liable not only for those alleged damages but also for all alleged damages, regardless of their proximate relationship to the action for which he was found liable. The decision effectively holds that as a matter of federal law, the FDIC has greater rights against Petitioner than State Savings would have had if it had brought the same state law claims. This is inapposite to basic receivership and assignment law that the receiver or assignee has no greater rights than the failed institution or assignor. *COIT Independence Joint Venture v. FSLIC*, 489 U.S. 565, 585 (1989) (respondent, upon becoming receiver, "steps into the shoes of the failed savings and loan"); *FDIC v. Ernst & Young*, 967 F.2d 166, 170-71 (5th Cir. 1992) ("[n]o statutory jurisdiction or public policy exists to treat the FDIC differently from other assignees").

In sum, when the district court sought to establish what rights the FDIC had against Petitioner and what defenses Petitioner could raise, it was obligated to resolve both questions on the basis of Utah law. Utah law unmistakably provides that the FDIC had to prove its case by clear and convincing evidence and that Petitioner could raise affirmative defenses, including mitigation of damages, in an action for civil fraud. The Tenth Circuit's decision failed to correct the district court's fundamental errors, ignored this Court's decision in *O'Melveny* and created a circuit conflict which necessitates this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

NEIL A. KAPLAN
Counsel of Record
CLYDE, SNOW & SWENSON
201 South Main, Suite 1000
Salt Lake City, Utah 84111-2208
(801) 322-2516

VICTOR SIMON
KENNEDY & BARIS, L.L.P.
1225 19th Street, N.W.
Suite 710
Washington, D.C. 20036
(202) 835-0313

Attorneys for Petitioner

APPENDIX A — ORDER GRANTING EXTENSION

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

April 17, 1995

Mr. Victor Simon
Kennedy & Baris
1225 19th Street, N.W.
Washington, DC 20036

Re: Martin L. Mandel
v. Federal Deposit Insurance
Corporation, etc.
Application No. A-775

Dear Mr. Simon:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on April 17, 1995, extended the time to and including June 30, 1995.

This letter has been sent to those designated on the attached notification list.

In the future, pursuant to Rule 22, the original and two copies of the application is required.

Sincerely,

WILLIAM K. SUTER, Clerk

Appendix A

By s/ Loretta S. Ruffin
Loretta S. Ruffin
Assistant Clerk

NOTIFICATION LIST

Mr. Victor Simon
Kennedy & Baris
1225 19th Street, N. W.
Washington, DC 20036

Mr. Drew S. Days III
Solicitor General
U.S. Department of Justice
Washington, DC 20530

Mr. Robert E. Feldman
Act. Executive Sec.-FDIC
550 17th Street, N. W.
Washington, DC 20429

Patrick Fisher
United States Court of Appeals for
the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, CO 80257

APPENDIX B — ORDER OF THE TENTH CIRCUIT COURT OF APPEALS DATED FEBRUARY 1, 1995 DENYING PETITION FOR REHEARING AND SUGGESTION FOR HEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 91-4102
91-4144
(D.C. No. 85-C-1418-W)

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as manager of the FSLIC Resolution Fund, statutory successor to FSLIC in its corporate capacity,

Plaintiff-Appellee,

v.

J. WILLIAM OLDENBURG, INVESTMENT MORTGAGE INTERNATIONAL, INC., EMPIRE STATE WEST, LANDFUND, LTD., JAMES W. ROSSETTI, CHARLES H. BURGARDT, MGIC INDEMNITY CORPORATION, AMERICAN CASUALTY INSURANCE COMPANY OF READING,

Defendants,

and

MARTIN L. MANDEL,

Defendant-Appellant.

Appendix B

ORDER
Entered February 1, 1995

Before SEYMOUR, Chief Judge, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, and RONEY,* Circuit Judges.

*The Honorable Paul H. Roney, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By s/ L. Balzam
Deputy Clerk

Appendix B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-3157

PATRICK FISHER
CLERK

February 1, 1995

Mr. Neil A. Kaplan
Clyde, Pratt & Snow
201 South Main Street
Suite 1000
Salt Lake City, UT 84111-2208

Ms. Philomena M. Dane
Squire, Sanders & Dempsey
41 South High Street
1300 Huntington Center
Columbus, OH 43215

Mr. David W. Alexander
Mr. John R. Gall
Squire, Sanders & Dempsey
41 South High Street
1300 Huntington Center
Columbus, OH 43215

Appendix B

Ms. Kathleen V. Gunning
Federal Deposit Insurance Corporation
General Counsel
H-6089
550 17th Street, N.W.
Washington, DC 20429

Mr. Glen E. Davies
Parsons, Davies, Kinghorn & Peters
310 South Main Street
Suite 1100
Salt Lake City, UT 84101

Re: 91-4102, FDIC v. Oldenburg
Lower docket: 85-C-1418-W,
91-4144, FDIC v. Oldenburg
Lower docket: 85-C-1418-W

Dear Counsel:

Enclosed is a copy of an order entered today in the captioned case.

Please call this office if you have questions.

Sincerely,

PATRICK FISHER
CLERK

By: s/ Jim Powers
Deputy Clerk

PF:jtp

APPENDIX C — OPINION FOR THE TENTH CIRCUIT COURT OF APPEALS FILED OCTOBER 18, 1994

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 91-4102
91-4144

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Manager of the FSLIC Resolution Fund, statutory successor to FSLIC in its corporate capacity,

Plaintiff-Appellee,

v.

J. WILLIAM OLDENBURG, INVESTMENT MORTGAGE INTERNATIONAL, INC., EMPIRE STATE WEST, LANDFUND, LTD., JAMES W. ROSSETTI, CHARLES H. BURGARDT, MGIC INDEMNITY CORPORATION, AMERICAN CASUALTY INSURANCE COMPANY OF READING,

Defendants,

and

MARTIN L. MANDEL,

Defendant-Appellant.

Appendix C

Appeal from the United States District Court
for the District of Utah
(D.C. No. 85-C-1418-W)

Neil A. Kaplan, of Clyde, Pratt & Snow, Salt Lake City, Utah (Martin L. Mandel, Pro Se on the briefs), for Defendant/ Appellant.

John R. Gall, of Squire, Sanders & Dempsey, Columbus, Ohio (Herschel J. Saperstein of Watkiss & Sapperstein, Salt Lake City, Utah, David W. Alexander and Philomena M. Dane, of Squire, Sanders & Dempsey, Columbus, Ohio, with him on the briefs), for Plaintiff/Appellees, Federal Deposit Insurance Corporation.

Before SEYMOUR, Chief Judge, LOGAN, and RONEY, ** Circuit Judges.

SEYMOUR, Chief Judge.

The Federal Deposit Insurance Corporation (FDIC) brought suit against certain former officers and directors of State Savings & Loan Association of Salt Lake City, Utah (State Savings) for fraud and negligence in their operation of State Savings. Mr. Mandel, a former director of State Savings, appeals a judgment against him for fraud in connection with State Saving's acquisition of a parcel of real estate in California known as Park Glen. He also appeals the district court's denial of his Fed. R. Civ. P. 60(b) motion to vacate the judgment. After a thorough review of the parties' arguments and the voluminous record, we affirm.

** The Honorable Paul H. Roney, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Appendix C

I.

The parties tried this case to the district court sitting without a jury. The court issued extensive Findings of Fact and Conclusions of Law in February 1991, holding Mr. Mandel liable for fraud in connection with the acquisition of Park Glen. A summary of the facts surrounding State Savings acquisition of Park Glen is set out in a related appeal at *FDIC v. Oldenburg*, Nos. 91-4093, 91-4095, 91-4137, __ F.3d __ (10th Cir. September 8, 1994).

Mr. Mandel first asserts that the proper standard of proof for fraud under state law is clear and convincing evidence, and that the district court erred by applying the preponderance of evidence standard to the FDIC's fraud claim. The FDIC contends that Mr. Mandel did not raise this issue below and that, in any event, federal law governs this suit brought by the FDIC. After reviewing the record, including supplemental materials submitted by the parties, we are convinced that Mr. Mandel did not raise this issue below. The district court clearly stated in its conclusion of law no. 4 that the FDIC must prove fraud by a preponderance of evidence. Mr. Mandel did not propose an alternative standard to the district court, and he did not contest the district court's conclusion once it was issued. To the extent he raised the clear and convincing standard at all, he did so in a separate and distinct context, *i.e.*, his assertion that the FDIC's settlement with a fidelity insurer included its fraud claim against him. Because Mr. Mandel failed to raise the burden of proof issue below, we will not address it on appeal. *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991).

Mr. Mandel next claims that the district court erred by refusing to permit him to introduce evidence of the post-

receivership conduct of the FDIC with respect to Park Glen. The crux of his argument is that the FDIC's negligence and mishandling of assets under its control substantially contributed to the ultimate losses, making the court's finding that State Savings suffered $22,000,000 in damages from fraud and conspiracy clearly erroneous. Mr. Mandel contends that the district court erred in preventing him from introducing evidence of the FDIC's contributory negligence and failure to mitigate damages.

We review the district court's evidentiary rulings for abuse of discretion. *Durtsche v. American Colloid Co.*, 958 F.2d 1007, 1011 (10th Cir. 1992). There is some debate over whether the officers and directors of a failed financial institution can assert the affirmative defenses of contributory negligence and mitigation of damages against the FDIC. *See FDIC v. Bierman*, 2 F.3d 1424, 1438 (7th Cir. 1993) (noting the issue "has been a contentious matter for some time") *Resolution Trust Corp. v. Vanderweele*, 833 F. Supp. 1383, 1390 (N.D. Ind. 1993) (listing district court cases on both sides of issue). Nevertheless, the clear majority rule is that these defenses are not available. *See FDIC v. Mijalis*, 15 F.3d 1314, 1323 (5th Cir. 1994); *Vanderweele*, 833 F. Supp. at 1390 (citing *Resolution Trust Corp. v. Youngblood*, 807 F. Supp. 765 (N.D. Ga. 1992); *Resolution Trust Corp. v. Scaletty*, 810 F. Supp. 1505, 1516-18 (D. Kan. 1992); *Resolution Trust Corp. v. Kerr*, 804 F. Supp. 1091, 1100 (W.D. Ark. 1992); *Resolution Trust Corp. v. Greenwood*, 798 F. Supp. 1391, 1397 (D. Minn. 1992); *FSLIC v. Shelton*, 789 F. Supp. 1367, 1369-70 (M.D. La. 1992); *FDIC v. Isham*, 782 F. Supp. 524, 530-32 (D. Colo. 1992); *FDIC v. Crosby*, 774 F. Supp. 584, 587 (W.D. Wash. 1991); *FDIC v. Stuart*, 761 F. Supp. 31, 32 (W.D. La. 1991); *FDIC v. Baker*, 739 F. Supp. 1401, 1407 (C.D. Cal. 1990); *FDIC v. Greenwood*, 719 F. Supp. 749, 751 (C.D. Ill. 1989); *FDIC v.*

Appendix C

Carlson, 698 F. Supp. 178, 179 (D. Minn. 1988); *FSLIC v. Burdette*, 696 F. Supp. 1183, 1189-90 (E.D. Tenn. 1988).

The two circuit courts which have directly addressed this issue have held that when the FDIC, in its corporate capacity, sues the former officers and directors of a failed bank to recover losses sustained by the bank, it is not subject to the affirmative defenses of mitigation of damages, *see Mijalis*, 15 F.3d at 1324; *Bierman*, 2 F.3d at 1441, and contributory negligence. *See id.* In *Bierman*, the court recognized that special public policy considerations distinguish banking cases from ordinary tort cases where these affirmative defenses are normally available. 2 F.3d at 1438-39. The FDIC owes no duty to the failed financial institution or to the wrongdoers who contributed to its failure, but rather to the public at large. *Id.* "Therefore, when the FDIC acts to replenish the [banking] insurance fund through the disposition of assets of the failed bank, including the right of action against the officers and directors, it has no duty first to attempt to mitigate the damages attributed to those individuals by seeking other, and perhaps less sure, avenues of relief." *Id.* at 1439-40. The court also based its holding, in part, on the conclusion that "excepting the FDIC from such affirmative defenses is consonant with the discretionary function exception to the [Federal Tort Claims Act, 28 U.S.C. § 2671]." *Id.* at 1441. The court in *Mijalis* acknowledged that the "great majority of the district courts is in accord with the conclusion reached by the *Bierman* court," and, applying the *Bierman* analysis, rejected the mitigation of damages defense. *Mijalis*, 15 F.3d at 1323-24.

We believe the analysis of this issue, as expressed in *Bierman* and other cases, is sound, and we see no reason to depart from the majority rule in this case. Indeed, as one court has already noted,

> nothing could be more paradoxical or contrary to sound policy than to hold that it is the public which must bear the risk of errors of judgment made by [FDIC] officials in attempting to save a failing institution — a risk which would never have been created but for defendants' wrongdoing in the first instance.

Roy, 1988 WL 96570, at *1 (D. Md. June 28, 1988).

Accordingly, we hold that when the FDIC sues to recover on the assets of a failed financial institution, the responsible officers and directors of such institution may not assert the affirmative defenses of contributory negligence and mitigation damages against the FDIC. The district court therefore did not abuse its discretion when it refused to permit Mr. Mandel to introduce evidence of the post-receivership conduct of the FDIC in an attempt to reduce his liability for damages sustained as a result of the Park Glen transaction.

Finally, Mr. Mandel contends that the district court's findings of fact as to numerous issues are clearly erroneous. He claims that the court erred by finding (1) that he concealed the Park Glen transaction from regulatory authorities and the only outside director of State Savings, Bryan Wilkinson, (2) that he intended to deceive and defraud State Savings, (3) that he was involved in the management of Empire, the company from which State Savings purchased Park Glen, (4) that multiple versions of the Park Glen sales agreement were prepared on January 31, 1984, (5) that he knew the actual basis of Park Glen on that date was $3.5 million, (6) that he was aware of the $10 million wire transfer for Park Glen, (7) that he knew the board meeting held on January 31, 1984 supposedly approving the purchase of Park

Glen was not a regular or special meeting of State Saving's board of directors, (8) that he knew the board of State Savings had not approved borrowing $5 million to accomplish the Park Glen transaction, and (8) that he wrote a false and fraudulent letter to federal regulatory official John Morris concerning the Park Glen transaction. We review these factual findings under the clearly erroneous standard. *Salve Regina College v. Russell,* 499 U.S. 225, 233 (1991) (applying Fed.R.Civ.P. 52(a)); *O'Connor v. R.F. Lafferty & Co.,* 965 F.2d 893, 901 (10th Cir. 1992). "A finding of fact is not clearly erroneous unless 'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.' " *Las Vegas Ice & Cold Storage Co. v. Far West Bank,* 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire v. United States,* 826 F.2d 949, 953 (10th Cir. 1987)). "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings." *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 (1985).

After reviewing the record, we are not persuaded the factual findings of the district court are clearly erroneous. We find Mr. Mandel's assertions in many instances that the record "is bereft of any evidence," Aplt. Br. at 36, or "without any proof, whatsoever," *id.* at 30, incredible in light of ample evidence, both direct and circumstantial, supporting the court's findings. Mr. Mandel asserts that the "findings here are supported only by the self-serving testimony of the Federal Regulators or a defendant seeking to curry the favor of the U.S. attorney. . . . " *Id.* at 30. The record does not support Mr. Mandel's bold assertion, and in any event, as we noted above, credibility determinations are left to the trial judge. The fact that Mr. Mandel does not agree with the testimony of certain witnesses does not make factual findings

based upon such testimony clearly erroneous. Because the parties' versions of events differed at trial, the comparative credibility of the parties was particularly important to the court's findings of fact and we see no basis for overturning them. After reviewing the record, we are not "left with the definite and firm conviction that a mistake has been made." *LeMaire*, 826 F.2d at 953. The findings of the district court are affirmed.

II.

Claiming newly discovered evidence, Mr. Mandel appeals the district court's denial of his motion to vacate judgment pursuant to Fed.R.Civ.P. 60(b). The newly discovered evidence offered by Mr. Mandel includes the unsuccessful attempt by James Rossetti, former president of State Savings, to withdraw a guilty plea to crimes arising out of the Park Glen transaction, and certain testimony of Kimberly McDonald, a former executive secretary of Mr. Mandel, confirming testimony Mandel gave at trial. We review the district court's denial of Mr. Mandel's Rule 60(b) motion under the abuse of discretion standard. *Graham v. Wyeth Lab.*, 906 F.2d 1399, 1414-15 (10th Cir.), *cert. denied*, 498 U.S. 981 (1990).

In order for Mr. Mandel to satisfy the requirements of Rule 60(b) he must demonstrate, among other things, that the "newly discovered evidence would probably produce a different result." *Id.* at 1416. In its order denying Mr. Mandel's motion to vacate, the district court recognized this strict requirement and stated that it "could not be met even if the judgment were set aside and the additional evidence accepted." Aplt. App., vol. I, at 292. Our review shows no abuse of discretion.

The judgment of the district court is AFFIRMED.

APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION FILED FEBRUARY 26, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No: C-85-1418W

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund,

Plaintiff,

-vs-

J. WILLIAM OLDENBURG, et al.,

Defendants.

AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,

Plaintiff-Intervenors,

-vs-

J. WILLIAM OLDENBURG, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the court, sitting without a jury, commencing on April 9, 1990 and with the presentation of live testimony being completed on April 18, 1990. During the trial

and thereafter the parties designated voluminous portions of deposition testimony and testimony given at a criminal trial in California to be read by the court and to be considered as evidence in this case. Also, and following the court hearing the live testimony at trial and taking the case under advisement on April 18, 1990, the court permitted the filing of supplemental findings of Fact, Conclusions of Law and Trial Briefs. The last of these was received by the court on or about June 6, 1990. During the course of the trial, the plaintiff was represented by Herschel J. Saperstein, John R. Gall and David W. Alexander. Defendant Martin L. Mandel was represented by B. L. Dart and Mark A. Larsen. Defendants MGIC Indemnity Corporation and American Casualty Company were represented by Lewis C. Roberts. The defendants J. William Oldenburg, Charles H. Burgardt and James W. Rossetti Investment Mortgage International, Inc., Landfund Ltd. and Empire State West were not represented by counsel. Prior to or during the trial certain of the parties settled their differences and therefore did not participate in the trial.

After having taken the case under advisement and having read all of the designated materials, post-trial memoranda, and having considered a number of authorities relating to the case, and now being fully advised and good cause appearing and pursuant to Rule 52 Fed. R. Civ. P., the court makes and enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, Federal Deposit Insurance Corporation, is a corporation and an agency and instrumentality of the United States organized and existing under 12 U.S.C. § 1811 *et seq.*, and authorized to sue by act of Congress, 12 U.S.C. § 1819.

Appendix D

2. Prior to August 9, 1989, the Federal Savings and Loan Insurance Corporation ("FSLIC") was a corporate body and an agency and instrumentality of the United States which operated under the direction and control of the Federal Home Loan Bank Board ("FHLBB") and had its principal office in the District of Columbia. As such, the FSLIC was responsible for insuring the depository accounts of eligible institutions, including the State Savings & Loan Association of Salt Lake City, Utah ("State Savings"), and for examining and supervising insured savings and loan associations. 12 U.S.C. §§ 1724, 1726(b), 1729(F) and 1730(m).

3. At all relevant times herein the FSLIC insured the deposits of State Savings.

4. On April 12, 1985, the Federal Home Loan Bank Board, with the concurrence of the State of Utah, appointed the FSLIC receiver of State Savings pursuant to 12 U.S.C. § 1729(c)(1)(B) because, among other things, it was insolvent as defined in 12 U.S.C. § 1464(d). FSLIC, as receiver, subsequently assigned to FSLIC, in its corporate capacity, among other things, all claims of State Savings against the former directors, officers, controlling persons, employees and shareholders of State Savings.

5. Pursuant to Section 215 (to be codified at 12 U.S.C. § 11(A) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), which were enacted into law on August 9, 1989, all assets of the FSLIC were transferred to the FSLIC Resolution Fund. Pursuant to that same provision, all assets of the FSLIC Resolution Fund are managed by the FDIC.

6. FDIC, in its capacity as manager of the FSLIC Resolution Fund, has been substituted as plaintiff herein.

Appendix D

7. Defendant J. William Oldenburg "(Oldenburg") is a citizen of the State of California. He became the 99.9% owner of State Savings as of October 4, 1983 and maintained that ownership during all relevant times thereafter. He was Chairman of the Board of Directors of State Savings from October 28, 1983 to June 6, 1984. During that period and at all relevant times otherwise he was also the 100% owner, Chairman of the Board and President of defendant Investment Mortgage International, Inc. ("IMI"); the 100% owner, Chairman of the Board and President of defendant Empire State West ("Empire"); and the 100% owner, Chairman of the Board and President of defendant Landfund, Ltd. ("Landfund").

8. Defendant IMI is a corporation organized and existing under the laws of State of Delaware. At all relevant times, IMI had its principal place of business in San Francisco, California. It was engaged in the business of providing real estate financing services, including the procurement of financing for large real estate development projects.

9. Defendant Empire is a corporation organized and existing under the laws of the State of Washington. At all relevant times, Empire's principal place of business was in San Francisco, California. It was primarily engaged in the business of owning and developing a parcel of real estate near Richmond, California, known as Park Glen Estates ("Park Glen").

10. Defendant Landfund is a corporation organized and existing under the laws of the State of California. At all relevant times, Landfund's principal place of business was in San Francisco, California. It was primarily engaged in the business of loaning money to real estate developers in connection with projects as to which IMI was engaged to procure financing.

Landfund had no employees of its own, IMI employees performed Landfund's business functions.

11. Defendant James W. Rossetti ("Rossetti") is a citizen of the State of California. He was appointed Vice Chairman of the Board of Directors of State Savings, its President and Chief Executive Officer and the Chairman of its Loan Committee on October 28, 1983 by the State Savings Board of Directors. He remained as President, Chief Executive Officer, Chairman of the Loan Committee and a Director thereafter until September 26, 1984.

12. Defendant Martin L. Mandel ("Mandel") is a citizen of the State of California. He became a Director of State Savings on October 28, 1983 and continued in that capacity until on or about June 6, 1984. During the period while he was a Director of State Savings, he was also Senior Vice President — Corporate Counsel of defendant IMI. While employed by IMI, he was its chief in-house counsel. He was also involved in the management of defendant Empire.

13. Defendant Charles H. Burgardt ("Burgardt") is a citizen of the State of North Carolina. He became Senior Vice President, Secretary and Corporate Legal Counsel of State Savings on October 28, 1983 and remained in that capacity at all times relevant hereto.

14. Defendant MGIC Indemnity Corporation is a corporation organized and existing under the laws of the State of Wisconsin. It has its principal place of busniess at MGIC Plaza, P. O. Box 488, Milwaukee, Wisconsin 53210. MGIC has been doing business in this judicial district at all relevant times.

Appendix D

15. Defendant American Casualty Company of Reading, Pennsylvania, ("American") is a corporation organized and existing under the laws of the State of Pennsylvania. It has its principal place of business at 401 Penn Street, Reading, Pennsylvania 19601. American has been doing business in this judicial district at all relevant times.

16. State Savings was a Utah corporation. In 1919, it was chartered as a Savings and Loan Association by the Department of Financial Institutions of the State of Utah. In 1936, State Savings was approved for federal deposit insurance by FSLIC. State Savings' activities, at all relevant times hereto, were regulated by the Department of Financial Institutions of the State of Utah and the FHLBB and the FSLIC, under §§ 7-1-101 *et seq.*, Utah Code Annotated and 12 U.S.C. § 1724 *et seq.*, (1976 supp.V) and 12 C.F.R. §§§ 461 *et seq.* (1983).

17. In mid-1983, Oldenburg began negotiations to acquire State Savings from American General Corporation. He consummated the acquisition on October 4, 1983 when he purchased 99.9% of the stock of State Savings for $10,500,000.00.

18. Immediately after his acquisition, Oldenburg installed Rossetti as the *de facto* Chief Executive Officer of States Savings.

19. Prior to Oldenburg's acquisition, State Savings had been exclusively as a residential lender. Most of such lending involved the purchase or construction of single family houses. A small additional portion involved lending to developers in the $1,000,000.00 to $2,000,000.00 range for development of single family house subdivisions. No one at State Savings had any

significant experience in commercial lending on large real estate development projects as of October 4, 1983. State had no commercial loan policies or procedures applicable to such lending at the time of Oldenburg's acquisition of the institution and none were adopted until a time subsequent to June 1, 1984.

20. As of October 4, 1983, and thereafter, there were certain minimum underwriting procedures and standards that were generally accepted and customarily utilized in the savings and loan industry with respect to large construction loans and other large commercial loans, i.e., loans in excess of $1,000,000.00, in order to insure the lending institution that the loan was safe and sound. It was not consistent with prudent lending practice for a federally insured savings and loan association to process and make loans in the absence of suitable underwriting procedures and standards.

21. As of October 4, 1983, and thereafter, it was customary and usual in the industry, and consistent with prudent lending practices that federally insured savings and loan associations have prescribed underwriting procedures and guidelines in place for the guidance of its employees who were engaged in processing and making loans and making decisions with respect to loans.

22. As of October 4, 1983, and thereafter, the Board of Directors of a federally insured savings and loan association had the duty and the responsiblity to approve, promulgate, and prescribe underwriting standards and procedures and guidelines for the institution.

23. In the context of loans made by federally insured savings and loan associations during the year 1983, underwriting

and the underwriting process consisted of gathering and independently reviewing and analyzing all pertinent information on the borrower, including information concerning financial stability and ability to repay, gathering and independently reviewing and analyzing all pertinent information on the property, including appraisal on the property and the assessment of market conditions for the type of property to be held as security, and then arriving at a decision as to whether or not the loan application was aceptable under the institution's credit standards and that the loan terms are in compliance with regulatory requirements, both state and federal.

24. It was consistent with prudent lending practices in the industry in 1983 for all appraisals on property which was to be held as security for a loan, to be made for and addressed to the institution making the loan, because the lender should control the appraisal process. The concern underlying this underwriting standard was to guard against the risk that an appraiser would be susceptible to influence by the borrowers establishing valuations. It was not consistent with prudent lending practices in the industry for appraisals to be made for and addressed to someone other than the lender.

25. In 1983, it was customary and usual in the industry and consistent with prudent lending practice that those employees with responsibilities for loan underwriting in a federally insured savings and loan association be familiar with the content of the insurance regulations as they related to appraisals of the real property to be held as security for the loan and also be familiar with the content of Federal Home Loan Bank Board Memorandum R 41-b ("FHLBB Mem. R 41-b"). Federal Home Loan Bank Board Regulations (563.17-1(c)(1)(iii)) required that such appraisals be made by a person duly appointed and qualified as an appraiser by the Board of Directors of the association prior to the approval of any loan application.

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26. In 1983, it was customary and usual in the industry and consistent with prudent lending practice that those participating in loan underwriting in a federally insured savings and loan association be generally aware of the federal regulations then in existence relating to conflicts of interest, including 12 C.F.R. § 563.40(a) prohibiting the direct or indirect payment of loan procurement fees to an affiliate and 12 C.F.R. § 563.43(c)(2) prohibiting an insured institution from making a loan secured by real property with respect to which an affiliate of the institution holds a security interest.

27. IMI was engaged in the business of procuring financing for large real estate development projects at the time Oldenburg acquired State Savings. IMI's standard operating procedure was to agree with the developer to attempt to procure construction and permanent financing during a specified period of time, usually ninety-days. In exchange, the developer agreed to pay IMI a financing fee in stages at various times during the financing process. The essential terms of the agreement were reflected in a standard form Fee and Security Agreement ("FASA") which IMI drafted and utilized.

28. Prior to October 4, 1983, IMI had entered into a standard form FASA with each of the developers on four real estate development projects known as the Brickyard, Mt. Crested Butte, Peregrine Village and Decathlon Club, respectively. In each FASA, the developer promised to pay IMI a fee for securing financing for the project. In each case the developer's promise to pay the IMI fee was evidenced and secured by a note and a security interest, i.e., a deed of trust, on the project property.

29. The standard FASA required that IMI use its best efforts to find construction financing for the developer within ninety

days from the date that the developer provided specified documents to IMI. In exchange, the developer promised to pay IMI a fee of approximately ten percent (10%) of the amount of requested financing.

30. Pursuant to the standard FASA, the developer in each case paid a $100,000.00 "Good Faith Deposit" to IMI. That deposit (less a non-refundable payment of $2,500.00) was refundable to the developer if IMI did not procure financing commitments from lenders within ninety days.

31. Pursuant to the standard FASA, one percent of the face amount of the total financing was "earned" by IMI at the time of the issuance of the construction loan commitment. The balance of the fee was "earned" by IMI at the time of delivery to the developer of financing commitments for construction and standby loans.

32. On November 11, 1982, IMI entered into a FASA with the Innisfree Companies, Inc. ("Innisfree"). The FASA required IMI to use its best efforts to find construction and permanent financing within ninety days in the face amount of $35,000,000.00 for the proposed Brickyard development, a 210 condominium unit project located in Richmond, California, in exchange for which IMI was to receive a fee of $3,250,000.00 from Innisfree. Innisfree was the project developer.

33. The payment of IMI's fee was secured by a promissory note and a deed of trust on the project property.

34. Shortly after the FASA was executed, IMI personnel recorded that the proposed borrower, Innisfree, "Has no money to complete the working plans for the project," and "is anxious to

secure the Brickyard loan to help bail them out of their existing financial problems." IMI understood that the Innisfree's credit problems, as reported in Dun & Bradstreet, could "inhibit IMI's ability to effectively market the Brickyard project." IMI personnel concluded that "we need to get [Innisfree] some dough in a hurry," and that "Innisfree is in desperate need of a 'bail-out' loan against land equity if the project is to get off the ground."

35. IMI was unable to procure financing for the Brickyard loan during the initial ninety-day period of the FASA. IMI and Innisfree executed an amended FASA on March 10, 1983. The amount of the requested financing was increased to $40,000,000.00 and Innisfree agreed to pay IMI an increased procurement fee of $3,715,000.00.

36. Also on March 10, 1983, IMI solicited Rossetti, who was then employed by Eureka Federal Savings and Loan, for a lead construction loan commitment. Rossetti signed a construction loan commitment on behalf of Eureka, but Eureka later withdrew its commitment.

37. IMI was unable to find financing for the Brickyard loan during the ninety-day period of the amended FASA. IMI and Innisfree executed a second amended FASA on June 20, 1983. Pursuant to the second amendment, the loan amount was increased to $43,300,000.00 and IMI's fee was increased to $4,022,000.00, $3,922,000.00 of which was payable as follows: $433,000.00 at the time of the issuance of the lead interim construction loan commitment and $3,489,000.00 at the time of delivery to the developer of the requisite financing commitments. The $3,922,000.00 component of IMI's fee was again secured by a promissory note and deed of trust.

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38. Delays in closing the construction loan resulted in further cash flow problems for Innisfree and a further Landfund loan of $85,000.00 to Innisfree was recommended by IMI personnel.

39. IMI was unable to complete the financing for the Brickyard project by September 20, 1983. On September 30, 1983, IMI and Innisfree agreed to extend the second amended FASA to December 20, 1983.

40. A few days later, on or around October 4, 1983, defendant Oldenburg acquired State Savings. On October 12, 1983, IMI solicited State Savings' participation as lead lender on the Brickyard loan. On that same day, Rossetti signed lead construction and standby loan commitments, purportedly as President of State Savings, pursuant to which State Savings committed to loan $5,000,000.00 on the construction loan and $5,000,000.00 on the standby loan. State Savings' commitment in this instance was purportedly subject, among other things, to State's receipt and review of commitments from institutional investors sufficient to achieve the total loan amount of $43,300,000.00. State Savings' commitment was also expressly subject to its receipt and approval of an M.A.I. real estate appraisal which would support a loan to value ratio not to exceed seventy-five percent (75%).

41. On or around October 19, 1983, Innisfree borrowed an additional $586,000.00 from Landfund. $433,000.00 of the proceeds of that loan were used by Innisfree to pay IMI the fee due under the June 20, 1983 second amended FASA for IMI's procurement of a lead interim construction loan commitment from State Savings. The loan from Landfund was secured by a promissory note and a deed of trust on the project property.

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42. On October 21, 1983, Rossetti sent IMI a purported confirmation that he had reviewed the M.A.I. appraisal on the Brickyard project. Rossetti does not recall reviewing the appraisal.

43. State Savings first received an appraisal report on the Brickyard project from IMI on November 28, 1983. The appraisal report had been prepared for Innisfree as of June 15, 1983. It contained no history as to previous sales of the property and was not addressed to or prepared for State Savings. The appraisal was not prepared in accordance with Insurance Regulations 563.17-1(c)(1)(iii) which required that the appraisal be made by a person duly appointed and qualified as an appraiser by the Board of Directors prior to the approval of any loan application. The appraiser, Robert K. Rosenbush had not been approved prior to Rossetti's commitment on October 12, 1983 nor prior to the actual closing and initial disbursement of the loan on December 1, 1983.

44. Prior to IMI's procurement of State Savings' lead construction loan commitment, IMI had experienced significant difficulty in finding participants for the proposed construction loan. Although IMI had been attempting to procure construction loan participants since the first FASA was signed on November 11, 1982, sufficient lenders had not been found.

45. On December 1, 1983, Rossetti authorized State Savings' participation to the extent of an additional $7,800,000.00 for a ninety-day period. State Savings' total participation interest committed as of that date was therefore $12,800,000.00. Also on December 1, 1983, IMI itself assumed a temporary construction loan participation of $8,000,000.00 in the Brickyard loan. Only with the additional participation by

State Savings and IMI's own commitment, was the $43,300,000.00 total loan commitment achieved.

46. The Brickyard loan was closed for State Savings on December 1, 1983. As of December 1, 1983, IMI did not have participation commitments for the loan from institutional investors totalling $43,300,000.00; and as of December 1, 1983, State Savings did not have an appraisal in compliance with FHLBB Mem. R. 41-b. If the Rosenbush appraisal had been properly discounted for sell-out time in accordance with FHLBB Mem. R. 41-b, the loan-to-value ratio would have been 97.45%, substantially in excess of the loan-to-value ration of 75% required by State Savings' interim commitment and paragraph I of the FASA.

47. At the closing on December 1, 1983, IMI and Landfund were paid from loan proceeds $2,623,000.00 and $1,340,608.00, respectively. At the time such payments were made, both Landfund and IMI held security interests on the Brickyard project real estate. IMI received a total gross loan procurement fee of $4,022,000.00 on the Brickyard project loan of which the amount disbursed from the loan proceeds on December 1, represents a part. The net loan procurement fee paid to IMI on the Brickyard project was $1,707,000.00. Total payments to Landfund were $1,266,212.00. The total loan procurement fee of $4,022,000.00 represents 9.02% of the loan amount of $43,300,000.00. Loan fees, including standby loan fees that were customary and usual in the industry during 1983 were typically 3-1/2% to 5%.

48. The Brickyard loan was not underwritten by State Savings in a manner consistent with prudent lending practices for a federally insured savings and loan association in 1983. State Savings relied entirely upon the underwriting of IMI and

performed no independent underwriting of its own. Under these circumstances, States Savings assumed all of the risk of the loan, whereas IMI assumed no risk because its fees were paid up front, in full upon closing. State Savings was required, consistent with prudent lending practices to perform its own independent underwriting of the Brickyard loan.

49. The underwriting procedures employed by IMI with respect to the Brickyard loan were not consistent with prudent lending practice or prudent underwriting procedures and the Brickyard loan was not a safe and sound loan when made.

50. State Savings maintained its participation in the Brickyard loan through April 11, 1985. No steps were ever taken prior to that date to dispose of or sell off such interest. Subsequent to April 12, 1985, FSLIC, as Receiver of State Savings, undertook to and did liquidate State Savings' interest in the Brickyard project loan and thereby realized a loss in connection therewith in the amount of $5,281,663.24.

51. IMI entered into a FASA with W/C and Associates, Inc., a Colorado corporation, On May 12, 1983. The FASA required IMI to use its best efforts to find construction and permanent financing within ninety days in the face amount of $31,000,000.00 for the proposed Mt. Crested Butte project, a 263 condominium hotel unit development to be located at the base of a ski lift at the Mt. Crested Butte ski resort in Mt. Crested Butte, Colorado, in exchange for which IMI was to receive a fee of $3,880,000.00 from W/C and Associates, Inc. W/C and Associates, Inc. was the project developer.

52. IMI's fee was secured by a promissory note and deed of trust.

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53. IMI was unable to procure financing during the initial ninety-day period of the FASA. On August 19, 1983, IMI personnel expressed concern that IMI had "not performed [regarding] placing the loan." "Short term funding" "to keep the project alive" was also recommended regarding the Mt. Crested Butte project.

54. On August 22, 1983, an internal IMI memorandum reported that the "Crested Butte project is now at a critical point" and that "our credibility is on the line."

55. On September 7, 1983, a request was made to and approved by the Landfund "loan committee" for a loan in the amount of $1,700,000.00 for the Mt. Crested Butte project. The recommendation and approval contemplated that in exchange for the Landfund loan, W/C and Associates would be requested to extend the IMI FASA to December 31, 1983.

56. On September 8, 1983, Landfund loaned the Mt. Crested Butte project developer, W/C and Associates, Inc., the sum of $1,700,000.00 and charged an origination fee in the amount of $150,000.00 for the loan. Proceeds of the loan were thereafter utilized to begin Phase I construction on the project, which included preliminary site and foundation work. The Landfund loan was evidenced by a Memorandum of Agreement, and was secured by a promissory note and deed of trust on the project property. IMI thereafter supervised disbursement of the Landfund loan proceeds to the project manager for, among other things, a building permit and architectural fees.

57. Also on or about September 8, 1983, W/C and Associates, Inc. and IMI executed an amendment to the original FASA. The amendment extended the original FASA to December 1, 1983.

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58. By the beginning of October, 1983, IMI had not found either a lead construction lender or other participants in the proposed construction loan sufficient to close the construction loan on the project prior to the expiration of the FASA on December 1, 1983. On October 12, 1983, nine days after Oldenburg acquired State Savings, Oldenburg personally requested that a lead interim construction loan commitment request for $5,000,000.00 be sent to Rossetti at State Savings. The lead interim loan request was sent out by IMI to Rossetti at State Savings the same day.

59. Rossetti signed the loan commitment on October 12, 1983, purportedly as President of State Savings. State Savings' commitment was subject, among other things, to State Savings' receipt and review of commitments from institutional investors sufficient to achieve the total loan amount of $31,000,000.00. State Savings commitment was also expressly subject to its receipt and approval of an M.A.I. real estate appraisal which would support a loan to value ratio not to exceed 75%.

60. On October 20, 1983, IMI forwarded to State Savings a June 8, 1983 appraisal on the project property. The appraisal report had been prepared for W/C and Associates, Inc. The appraisal reflected developer's profit at 28.5% of cost whereas 10% profit was customary and usual. The financing costs of $4,500,000.00 were included in the appraiser's cost of the project. This figure is at least double the normal cost for financing. The appraisal was not addressed to or prepared for State Savings. The appriasal was not prepared in accordance with Insurance Regulations (563.17-1(c)(1)(iii)) which required that the appraisal be made by a person duly appointed and qualified as an appraiser by the Board of Directors prior to the approval of any loan application. The appraiser, W. M. McClellan had not been

approved prior to Rossetti's commitment on October 12, 1983 nor prior to the actual closing and initial disbursement of the loan on December 16, 1983.

61. On November 25, 1983, an IMI internal memorandum reflected that delays in closing the construction loan had adversely affected the project cash flow. The memorandum also noted that delay in the closing of the construction loan had necessitated the developer's unanticipated return of pre-sale non-refundable deposits of over $1,000,000.00. The memorandum also advised that the closing on the loan was scheduled for November 30, 1983.

62. The Mt. Crested Butte loan was closed on December 16, 1983. As of December 16, 1983, State Savings did not have an appraisal in compliance with FHLBB Mem. R. 41-b. If the McClellan appraisal had been properly discounted for sell-out time in accordance with FHLBB Mem. R. 41-b, the loan to value ration was 106.03%, substantially in excess of the loan to value ratio of 75% required by paragraph 8 of State Savings' interim commitment and paragraph I of the FASA.

63. As of the date of closing, December 16, 1983, IMI did not have commitments from institutional investors for participation in the loan totalling $31,000,000.00. On December 16, 1983, IMI itself assumed a temporary participation in the loan of $8,000,000.00. Only with the additional participation by IMI, was the $31,000,000.00 loan total achieved.

64. At the closing on December 16, 1983, IMI and Landfund were paid $2,850,000.00 and $242,769.00, respectively. At the time such payments were made, both Landfund and IMI had security interests on the project real estate.

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IMI received a total gross loan procurement fee of $3,880,000.00 on the Mt. Crested Butte project loan of which the amount disbursed from loan proceeds represents a part. The net loan procurement fee paid to IMI on the Mt. Crested Butte project was $2,230,000.00. Total payments to Landfund were $1,700,000.00. In addition, there was disbursed and paid at closing the sum of $867,900.00 as a permanent mortgage fee purportedly pursuant to Gunnison Bank & Trust Company's commitment to make permanent loans to buyers of Mt. Crested Butte Condominium units after completion. The loan procurement fee of $3,880,000.00 and permanent mortgage fee of $867,900.00 total $4,747,900.00. The total of these fees represent 15.3% of the loan amount of $31,000,000.00. Loan fees including standby loan fees and permanent mortgage fees that were customary and usual in the industry during 1983 were typically 3-1/2% to 5%.

65. The Mt. Crested Butte loan was not underwritten in a manner consistent with prudent lending practices for a federally insured savings and loan association in 1983. State Savings relied entirely upon the underwriting of IMI and performed no independent underwriting of its own. Under these circumstances, State Savings assumed all of the risk of the loan, whereas IMI assumed no risk because its fees were paid up front, in full upon closing. State Savings was required, consistent with prudent lending practice to perform its own independent underwriting of the Mt. Crested Butte loan.

66. The underwriting procedures employed by IMI with respect to the Mt. Crested Butte loan were not consistent with prudent lending practice or prudent underwriting procedures and the Mt. Crested Butte loan was not a safe and sound loan when made.

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67. State Savings maintained its participation in the Mt. Crested Butte loan through April 11, 1985. No steps were ever taken prior to that date to dispose of or sell off such interest. Subsequent to April 12, 1985, FSLIC, as Receiver of State Savings, liquidated State Savings' interest in the Mt. Crested Butte project loan and thereby realized a loss in connection therewith in the amount of $4,254,198.32.

68. IMI entered into a FASA with Peregrine Properties, Ltd., a California limited partnership, on August 15, 1983. The FASA required IMI to use its best efforts to find construction and permanent financing within ninety days in the face amount of $22,000,000.00 for the proposed Peregrine Village project, a 103 residential condominium development in Avon, Colorado, in exchange for which IMI was to receive a fee of $1,652,000.00 from Peregrine Properties, Ltd. Peregrine Properties, Ltd. was the project developer.

69. IMI's fee was secured by a promissory note and deed of trust.

70. On October 11, 1983, IMI, Peregrine Properties, Ltd. and P.P.L. Development Corporation ("P.P.L."), a California corporation, executed an amendment to the original FASA pursuant to which P.P.L. was substituted for Peregrine Properties, Ltd.

71. On November 2, 1983, defendant Landfund loaned P.P.L. the sum of $229,000.00 for the purpose of paying IMI's fee due under the FASA in the amount of $220,000.00 for procuring the lead interim construction [loan] commitment. Landfund charged an origination fee of $9,000.00 for the loan. The terms of the loan were evidenced by a Memorandum of Agreement and

were secured by a promissory note and deed of trust on the project real estate.

72. On November 16, 1983, IMI solicited State Savings' participation as lead lender on the $22,000,000.00 Peregrine Village loan. On December 15, 1983, State Savings, by its Senior Vice President, Eugene Miller, signed a lead construction loan commitment in the amount of $2,200,000.00 to P.P.L. State Savings' construction loan commitment was expressly subject to its receipt and approval of an M.A.I. real estate appraisal which would support a loan to value ratio not to exceed 75%.

73. On that same date, December 15, 1983, State Savings first received an appraisal report dated October 1, 1983, on the project real estate from IMI. The appraisal had been prepared for and addressed to Peregrine Properties, Ltd. It contained no history as to previous sales of the property and was not addressed to or prepared for State Savings. The appraisal was not prepared in accordance with Insurance Regulations 563.17-1(c)(1)(iii) which required that the appraisal be made by a person duly appointed and qualified as an appraiser by the Board of Directors prior to the approval of any loan application. The appraiser, C. Hugh Bishop, had not been approved prior to Miller's commitment on December 15, 1983 nor prior to the actual closing and initial disbursement of the loan on December 22, 1983.

74. The Peregrine Village loan was closed on December 22, 1983. As of December 22, 1983, State Savings did not have an appraisal in compliance with FHLBB Mem. R. 41-b. If the Bishop appraisal had been properly discounted for sell-out time in accordance with FHLBB Mem. R. 41-b, the loan to value ratio was 82.16%, which exceeded the loan to value ration of 75% required by paragraph 7 of the interim commitment and paragraph I of the FASA.

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75. On December 22, 1983, the date of closing, IMI and Landfund were paid $1,832,000.00 and $233,799.61. At the time such payments were made, both IMI and Landfund held security interests on the project real estate. IMI received a total gross loan procurement fee of $2,652,000.00 on the Peregrine Village project loan, of which the amount disbursed from loan proceeds represents a part. The net loan procurement fee paid to IMI on the Peregrine Village project was $1,452,000.00. Total payment to Landfund were $220,000.00. The total loan procurement fee of $2,652,000.00 represents 12.05% of the loan amount of $22,000,000.00. Loan fees, including standby loan fees that were customary and usual in the industry during 1983 were typically 3-1/2% to 5%.

76. The Peregrine Village loan was not underwritten in a manner consistent with prudent lending practices for a federally insured savings and loan association in 1983. State Savings relied entirely upon the underwriting of IMI and performed no independent underwriting of its own. Under these circumstances, State Savings assumed all of the risk of the loan, whereas IMI assumed no risk because its fees were paid up front, in full upon closing. State Savings was required, consistent with prudent lending practice to perform its own independent underwriting of the Peregrine loan.

77. The underwriting procedures employed by IMI with respect to the Peregrine Village loan were not consistent with prudent lending practice or prudent underwriting procedures and the Peregrine loan was not a safe and sound loan when made.

78. State Savings maintained its participation in the Peregrine Village loan through April 11, 1985. No steps were ever taken prior to that time to dispose of or sell such interest.

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Subsequent to April 12, 1985, FSLIC, as Receiver of State Savings, liquidated State Savings' interest in the Peregrine Village project loan and thereby realized a loss in connection therewith in the amount of $3,991,903.01.

79. Prior to August 5, 1983, Executives Outlet, Inc., the owner of an athletic club in Santa Clara, California, known as the Decathlon Club, was in Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court for the Northern District of California. IMI was one of its creditors in an amount of $740,875.00, representing a fee due for previous financing assistance.

80. While in bankruptcy, Executives Outlet, Inc. entered into an agreement to be acquired by Western Athletic Clubs ("Western") subject to payment of Executives' then existing creditors and its release from bankruptcy.

81. IMI entered into a FASA with Western on August 5, 1983. The FASA required IMI to use its best efforts to find acquisition and renovation financing within ninety days in the face amount of $11,000,000.00 in exchange for which IMI was to receive a fee of $872,500.00. The payment of IMI's fee under the FASA was secured by a promissory note and a deed of trust on the Decathlon Club property.

82. On October 19, 1983, IMI and Western executed an amendment to the August 5, 1983 FASA. The amendment increased the amount of the financing to be procured to $11,500,000.00 and increased IMI's fee to $913,100.00. The payment of IMI's fee under the amended FASA was also secured by a promissory note and deed of trust on the Decathlon Club property.

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83. On October 21, 1983, IMI solicited State Savings' participation as lead lender on the $11,500,000.00 Decathlon Club loan in the amount of $1,500,000.00. The Loan presentation summary setting forth the solicitation was sent to State Savings in connection with a request for State Savings' participation which Oldenburg made directly to Rossetti. Included among the materials in the loan presentation summary was an appraisal report obtained by and addressed to Western. The appraisal was deficient in that it used the cost approach for valuation purposed, which represents the upper limit of value, without reporting what the borrower actually paid for the property. The appraiser used a developer's profit of 25% in his cost approach to value, whereas a typical developer's profit and overhead would not exceed 15%. The appraisal was not prepared in accordance with Insurance Regulations (§ 563.17-1(c)(1)(iii)) which required that the appraisal be made by a person duly appointed and qualified as an appraiser by the Board of Directors prior to the approval of any loan application. The appraiser, Norman C. Hulbert, had not been approved at any time prior to the actual closing and initial disbursement of the loan on November 16, 1983. The appraisal did not comply with FHLBB Mem. R. 41-b because it was not discounted for the loss of income to be incurred during the reasonable sell-out time of the memberships.

84. On October 21, 1983, the same date as IMI's solicitation of State Savings' participation, Rossetti signed and issued the requested commitment, purportedly as President of State Savings, for State Savings to serve as lead lender and to participate to the extent of $1,500,000.00 in the Decathlon Club loan. State Savings' commitment was subject, among other things, to State Savings' receipt and approval of letters of participation from other qualified institutional investors in the amount of $10,000,000.00.

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85. On October 27, 1983, Western borrowed $122,500.00 from Landfund. $115,000.00 of the loan proceeds were for the purpose of paying IMI's fee due under the amended FASA with Western for procuring the acquisition and renovation financing for Western. The loan was secured by a note and a deed of trust on the project real estate.

86. On November 15, 1983, because IMI did not have commitments for the loan totalling $10,000,000.00, Rossetti was requested to and did increase State Savings' participation to $2,500,000.00. On November 16, 1983, the date upon which the Decathlon Club loan was closed, Rossetti, again at the request of IMI, increased State Savings' participation again to $3,000,000.00 and made an additional commitment, "on a temporary basis," for $2,500,000.00 more, making a total of $5,500,000.00 to enable the loan to be closed.

87. The Decathlon Club loan was closed on November 16, 1983. At the closing, IMI and Landfund were paid $1,233,975.00 and $123,506.00, respectively. The total paid to IMI represented $740,875.00 of financing procurement fee due from Executives Outlit, Inc. for the original financing service and $493,000.00 in fees for the subsequent refinancing for Western. At the time such payments were made, IMI and Landfund held security interests on the project real estate. Two days later, on November 18, 1983, IMI transmitted an updated appraisal on the Decathlon project to State Savings. IMI received a total gross loan procurement fee of $913,100.00 on the Decathlon Club project loan, of which the amount disbursed from loan proceeds represents a part. The net loan procurement fee paid to IMI on the Decathlon Club project was $263,100.00. Total payments to Landfund were $122,500.00. The total loan procurement fees disbursed at closing of $1,233,975.00 and $115,000.00 total $1,348.975.00.

This figure represents 11.7% of the loan amount of $11,500,000.00. Loan fees, including standby loan fees that were customary and usual in the industry during 1983 were typically 3-1/2% to 5%.

88. The Decathlon loan was not underwritten in a manner consistent with prudent lending practices for a federally insured savings and loan association in 1988. State Savings relied entirely upon the underwriting of IMI and performed no independent underwriting of its own. Under these circumstances, State Savings assumed all of the risk of the loan, whereas IMI assumed no risk because its fees were paid up front, in full upon closing. State was required, consistent with prudent lending practice to perform its own independent underwriting of the Decathlon loan.

89. The underwriting procedures employed by IMI with respect to the Decathlon loan were not consistent with prudent lending practice or prudent underwriting procedures and the Decathlon loan was not a safe and sound loan when made.

90. State Savings maintained its participation in the Decathlon Club loan through April 11, 1985. No steps were ever taken prior to that time to dispose of or sell such interest. Subsequent to April 12, 1985, FSLIC, as Receiver of State Savings, liquidated State Savings' interest in the Decathlon Club project loan and thereby realized a loss in connection therewith in the amount of $220,000.00.

91. On October 28, 1983, Oldenburg held the first Board Meeting of State Savings subsequent to acquiring it. At the meeting, Oldenburg elected himself, Rossetti, Mandel, Muccino and Bryan Wilkinson to State Savings' Board of Directors. Mandel was present at the October 28 Board Meeting.

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92. On October 12, 1983, shortly prior to Mandel becoming a member of the Board of Directors of State Savings, Rossetti signed a Construction and Standby Lending Commitment, as President of State Savings, on the Brickyard loan.

93. On October 31, 1983, State Savings' Loan Committee approved the commitment previously undertaken on behalf of State Savings by Rossetti relating to the Brickyard loan.

94. The Brickyard loan closed and was funded on December 1, 1983. This was approximately three weeks before the next scheduled Board of Directors Meeting to be held on December 23, 1983.

95. On October 12, 1983 and shortly prior to the time Mandel became a member of the Board of Directors of State Savings, IMI sent a lead loan commitment request pertaining to the Mt. Crested Butte Project.

96. On November 30, 1983, approximately three weeks before the next scheduled Board of Directors Meeting, the Mt. Crested Butte loan closed.

97. On December 15, 1983, State Savings, through its Senior Vice President, Eugene Miller, issued a lead construction loan commitment in the amount of $2,200,000.00 on the Peregrine Project. This was over a week before the Board of Directors Meeting scheduled for December 23, 1983.

98. On the day before the Board of Directors Meeting, on December 22, 1983, the Peregrine loan closed.

99. On October 21, 1983 and shortly prior to Mandel being

elected as a Member of the Board of Directors of State Savings, Rossetti issued a loan commitment for State Savings to serve as lead lender on Decathlon Club loan.

100. Without Board of Director approval, Rossetti and the Loan Committee were authorized to make loans up to $5,000,000.00. Accordingly, Rossetti and the Loan Committee were authorized to and did bind State Savings on the Brickyard loan, the Mt. Crested Butte loan, the Peregrine loan, and the Decathlon loan.

101. Prior to the time of actual closing on the Decathlon Club loan, Rossetti agreed to make up the shortfall and increase State Savings' participation. Over a month before the next scheduled Board of Directors Meeting, the Decathlon Club Loan closed on November 16, 1983.

102. Because of prior commitments, Mandel did not attend the State Savings' Board of Directors Meeting scheduled for December 23, 1983.

103. Mandel did receive a copy of the minutes of the Meeting of the Board of Directors of State Savings dated December 23, 1983 on approximately January 10, 1984. At that time and thereafter Mandel could not have taken any effective action that would have eliminated State Savings' losses on the four loan for the following reasons:

(a) State Savings was legally committed on all four loans prior to the Board of Directors Meeting held on December 23, 1983.

(b) All four loans closed prior to the Board of

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Directors Meeting held on December 23, 1983.

(c) By the time Mandel received a copy of the Minutes of the Board of Directors Meeting held on December 23, 1983, State Savings was irrevocably committed on all four loans, funds had been disbursed, and there was no reasonable way Mandel could have taken effective action at that time to recover State Savings' money or to prevent the later resulting losses.

104. While Mandel may have been somewhat negligent in not preventing State Savings' participation in these four loans, his negligence was not the cause of the loans being made. Rather, the negligence which caused the loans to be made was that of other officers and directors of State Savings, including Oldenburg. Oldenburg was negligent in not preventing State Savings' participation in these loans, for failing to insure adequate underwriting policies were in place before commitments were made on these loans, as well as in other particulars, and this negligence caused damage to State Savings on the Brickyard loan in the amount of $5,281,663.24, on the Mt. Crested Butte loan in the amount of $4,254,198.32, on the Peregrine loan in the amount of $3,991,903.01, and on the Decathlon loan in the amount of $220,000.01, for a total amount of $13,746,764.58. At the time of his negligence causing these losses, Oldenburg was acting as the agent for IMI, Landfund and Empire, and they are jointly and severally liable with him for the foregoing damages caused to State Savings.

105. Park Glen was owned by Empire and that company was

interested in developing Park Glen. During the spring of 1983 title and zoning work was done on the proposed development and during the fall of 1983 IMI undertook to obtain financing for the initial phase of the project development in the amount of $50,000,000.00. During the period from September 1983 through January 1984 a number of design meetings concerning the Park Glen project were held and presentations were made to prospective participation lenders concerning the proposed $50,000,000.00 project loan. There was never any attempt by State Savings to purchase Park Glen from Empire prior to January 31, 1984.

106. As of July 1983, IMI was in good financial condition earning substantial amounts of money and with its expenses under control. However, subsequent to July 1983, the financial condition of IMI rapidly deteriorated for the worse. Part of this was attributable to several projects which involved substantial expense and which created a drain upon the cash flow of IMI. One very large expense item related to IMI's move to its new corporate offices in San Francisco, California, and most of this expense was incurred in approximately September and October 1983. During those two months this expense to IMI was approximately $8,500,000.00 which expense was paid for out of IMI operating accounts. A number of other extravagances occurred during this period of time resulting from conduct of Oldenburg including his having various furnishings flown in to California from abroad rather than being shipped and his conducting a very expensive opening party for approximately 400 people in connection with the opening of the new office. Other large expenses which depleted IMI's available cash resulted from Oldenburg's purchase of State Savings on October 4, 1983 for $10,500,000.00 in cash, Oldenburg's purchase of the L.A. Express football franchise in December 1983 with an outlay

of $4,900,000.00, a commitment to a signing bonus for a player on that team in the amount of $2,000,000.00, plus substantial cash bonuses being paid to various IMI executives around January 1984. During the period from September 1983 to January 1984, IMI was spending far more than it was earning. This fact was well known to Oldenburg and Mandel, among others, and they were well aware at the end of January 1984 that the financial situation of IMI was precarious.

107. In July of 1983, Stephen Spalding had been hired by Oldenburg to be the chief financial officer of IMI. From then until the end of January 1984, Spalding was aware of IMI's worsening financial situation and he regularly reported on this subject to, among others, Oldenburg. On January 30, 1984, Spalding and Muccino called Rossetti and told him that Oldenburg or IMI wanted to borrow $10,000,000.00 from State Savings. Rossetti's response to this request was that it would be a violation of the regulations to do this and Rossetti expressed anger at the request. Burgardt was with Rossetti when this telephone call was made and Burgardt heard Rossetti's side of the telephone conversation. Following the completion of the call Rossetti expressed disbelief to Burgardt at the request that had been made to loan Oldenburg $10,000,000.00 against the Park Glen project. Both Burgardt and Rossetti agreed at that time that it would be improper to do this and they expressed the intention to so advise Oldenburg.

108. Shortly following this telephone call of January 30, 1984, Rossetti and Tony Pontarelli met together to discuss what had been referred to in the January 30, 1984 telephone conversation. At this meeting were Rossetti, Pontarelli, Burgardt and Miller and Rossetti advised the group of the substance of the telephone conversation with Muccino on January 30, 1984. The group then discussed methods by which Oldenburg's request for

$10,000,000.00 could be satisfied. At this same meeting Burgardt discussed with the group various federal regulations including provisions pertaining to restrictions on affiliated party transactions. There was no dissent during this meeting as to the proposition that State Savings would be in violation of law if it lent money either to Oldenburg or IMI. It was the consensus of the group, however, that if Oldenburg had something worth $10,000,000.00 to sell and the Federal Home Loan Bank would approve such a sale that that would be the one and only way to get this amount of money to Oldenburg or IMI. Burgardt advised the group that the only way that the conflict regulation would be satisfied was if an independent appraisal showed the actual value of the project being purchased, that it was in the best interest of State Savings to make the purchase and that it have Federal Home Loan Bank approval.

109. On January 31, 1984 a meeting was held at IMI's office in San Francisco, California. Present at this meeting, among others, were Kambe, Oldenburg, Rossetti, Mandel and Muccino. Kambe, who was then president of Empire, had come to this meeting, which was a regular meeting of IMI senior management, expecting only to report on the status of the Park Glen project. However, at this meeting Kambe was advised that Park Glen was going to be sold to State Savings. Kambe had never before heard mention that such might occur. Also, prior to this date Rossetti had had no plan or intention for State Savings to purchase Park Glen. Earlier on the morning of this meeting and prior to its being held, Oldenburg had told Spalding that he had solved the problem relating to IMI's need for money.

110. After this decision was made on January 31, 1984, the terms of the sale were promptly worked out. Oldenburg was anxious to have the transaction completed promptly and he

advised what needed to be done. This meeting of January 31, 1984, was not a legitimate board meeting of State Savings.

111. At the time State Savings entered into the contract to acquire Park Glen on January 31, 1984 for $50,000,000.00, the sum of its reserves and undivided profits for purposes of § 7-7-31 of the Utah Code Annotated was no more than $5,707,198.00.

112. On this same date of January 31, 1984, two different versions of the sale agreement were drawn up. Mandel drafted one version which provided for prior Federal Home Loan Bank board approval of the sale. Another was drawn up which did not provide for such prior approval. At the time of this meeting there were previous appraisal reports in existence concerning the Park Glen property, but none of these were looked at or brought up or discussed by any of the participants at this meeting. Moreover, at this time there was no valid appraisal of Park Glen as raw land which was the state it existed in at that time. Kambe was not asked at this meeting to present any evidence as to the evaluation of Park Glen or concerning his efforts that had been made to attempt to obtain $50,000,000.00 in construction financing. Neither was there any discussion at this meeting concerning the fact that there were $16,500,000.00 in encumbrances on the Park Glen property as of January 31, 1984. In fact, even though Kambe was at that time president of Empire which was to be the seller of Park Glen, he had no real participation in the transaction agreed upon on that date.

113. While it is true that IMI had attempted prior to January 31, 1984 to put a $50,000,000.00 construction loan package together for Park Glen and had been unsuccessful in doing so, such package could not have been successfully assigned to State Savings even had such been obtained. This is so since the

standard form commitment letters used by IMI contained a standard provision that commitment participations were not assignable and terminated automatically in the event of an attempted assignment or transfer. Consequently, any attempted assignment to State Savings would have triggered this provision and resulted in an automatic termination.

114. As of January 31, 1984, Mandel knew of Oldenburg's urgent attempt to raise $10,000,000.00 for IMI. He further knew Oldenburg's request for a $10,000,000.00 loan from State Savings and he knew that Rossetti had told Oldenburg that any such loan would violate applicable law. Further, Mandel knew on January 31, 1984 that the Park Glen transaction agreed upon on that date was going to be a quick way to get $10,000,000.00 to IMI.

115. On January 31, 1984 Mandel was concerned about the tax consequences of Empire's sale of the Park Glen property to State Savings. In connection with these tax considerations and the amount of long-term capital gain, Mandel knew at that time that the actual basis on the Park Glen property was only $3,500,000.00. This basis was represented by the costs, improvements and other fees that had been put into the property up to that time. Mandel was not then certain how long Empire had owned Park Glen but believed it to have been for approximately two or three years. As of March 30, 1984, the fair market value of the Park Glen property as raw land was about $4,110,000.00.

116. Mandel was given the responsibility to draft the purchase agreement and to work out the agreement with counsel for State Savings. In doing this, Mandel knew that he was acting on behalf of the seller of the property to draft documents on behalf of Oldenburg. At that time Mandel did not look at 12

C.F.R. § 563.41 although Pontarelli had brought up the subject of that regulation. Mandel was also aware from what Pontarelli had said that Federal Home Loan Bank approval would be required of the transaction discussed at the meeting of IMI on January 31, 1984.

117. Shortly following the January 31, 1984 meeting, Oldenburg advised that the $10,000,000.00 should be wired and Rossetti asked Pontarelli to arrange for the wire transfer of $10,000,000.00 from State Savings to IMI immediately. This wire transfer was made later on January 31, 1984 even though Rossetti was well aware of the requirement of prior Federal Home Loan Bank approval. After this money was received by IMI it was used by that company as capital or to pay its bills. This $10,000,000.00 infusion was essential as of January 31, 1984 for IMI to continue its operations and IMI would have had great difficulty continuing to operate had this money not been received at that time. As of the time this wire transfer was made, State Savings Board had not given approval to this transaction. Mandel was aware of this at that time and knew that documentation would have to be prepared at a later time to justify the transaction. Mandel also knew at or about the time the $10,000,000.00 wire transfer was made that it had been made.

118. At the time of this transaction, State Savings outside director was Bryan Wilkinson. He was never advised by Mandel, Oldenburg, or anyone else who knew about the transaction that the $10,000,000.00 was transferred on January 31, 1984 in connection with the purchase of Park Glen by State Savings.

119. On February 21, 1984 a telephone conversation took place between John Morris, a supervisory agent of the Federal Home Loan Bank of Seattle, on one end of the line and Rossetti,

Miller, Burgardt, Pontarelli and Nuccino on the other end of the line. Among other subjects discussed at that time by Morris were affiliated transactions involving State Savings and other Oldenburg companies. Morris told the others participating in that conversation that there were not to be any dealings between State Savings and any Oldenburg companies until the Federal Home Loan Bank had more information. At no time during this telephone conversation was any disclosure made to Morris about the Park Glen transaction and what had taken place previously on January 31, 1984. As of March 5, 1984, Rossetti, Pontarelli and Miller knew that it was their obligation to request approval from the Federal Home Loan Bank Board for the Park Glen acquisition and to explain the $10,000,000.00 which had already been transferred. Also as of that date, Burgardt had been advised by outside attorneys that full disclosure of the transaction should be made to regulators. Despite this knowledge of the obligation to request regulatory approval, no approval was sought or obtained nor was the transaction even disclosed. In fact, Pontarelli called Morris on or about March 6, 1984 in an attempt to have Morris reconsider the oral directive he had given during the February 21, 1984 telephone call. This attempt was to no avail. Even despite this telephone call, Pontarelli made no specific mention of Park Glen to Morris, nor was Morris advised that the transaction called for the payment of $26,500,000.00 in cash by State Savings to an Oldenburg affiliate.

120. As of March 10, 1984 Burgardt knew that the Purchase and Sale Agreement would have to be redrafted to show that the $10,000,000.00 would be a deposit subject to refund if the Federal Home Loan Bank Board approval could not be obtained. In fact, Burgardt redrafted the purchase agreement to so provide but when this new draft was received by Mandel, the latter advised that this approval provision would have to be deleted and

that it would be impossible for the $10,000,000.00 to be returned. Burgardt did not pursue further the attempt to have such a provision and the document used to close the transaction contained no provision for a possible refund.

121. During this period of time Mandel was well aware that the critical January 31, 1984 meeting at IMI's office was not a regular or special meeting of the Board of Directors of State Savings. Substantially later minutes of a supposed January 31, 1984 special board meeting were prepared, but these were not minutes of a legitimately conducted meeting of the board.

122. The next regular meeting of the Board of Directors of State Savings was held on March 23, 1984 at Deer Valley, Utah. Up to that date no disclosure had been made to the Federal Home Loan Bank Board concerning the Park Glen transaction, although Mandel, among others, was aware during this period of time that such approval was necessary. Oldenburg, Rossetti, Mandel, Burgardt and the outside director, Bryan Wilkinson, were present at this March 23, 1984 meeting. Prior to this meeting Wilkinson had received no prior notice concerning the Park Glen transaction. At the meeting, Wilkinson was asked to ratify an earlier action of the Board of Directors that had occurred on January 31, 1984 at a "special board meeting", although no such meeting had occurred and had only been characterized as such after the fact.

123. A number of important facts pertaining to the Park Glen transaction were material to Wilkinson's consideration, but Oldenburg, Rossetti, Mandel and Burgardt either did not disclose them to him at the March 23, 1984 meeting, or they deliberately misrepresented such facts. Among them were the following:

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(a) IMI was very short of cash in January of 1984;

(b) At the end of January, Oldenburg attempted to borrow from State Savings for IMI's benefit the sum of $10,000,000.00;

(c) Rossetti refused the loan request because he believed it was unlawful;

(d) The Park Glen transaction was conceived as a vehicle to circumvent the fact that the loan could not be made;

(e) Park Glen was owned by Empire which was owned by Oldenburg. It had been purchased recently and the cost of the raw land plus improvements was approximately $3,500,000.00;

(f) Morris of the Federal Home Loan Bank of Seattle had told Rossetti, Burgardt, Pontarelli, Miller, and Muccino on February 21, 1984 that they were to have no more business dealings at all with Oldenburg's companies pending further investigation;

(g) That back-dated Board "minutes" of an illegitimate January 31, 1984 meeting had been created and Wilkinson was being asked to ratify action taken at this supposed board meeting;

(h) That despite competent advice that had been given to make full disclosure to federal regulators and to redraft the purchase agreement to include a clause providing for prior Federal Home Loan Bank approval, no such disclosure had been made nor had any such amended purchase agreement been prepared.

124. Mandel, Oldenburg, Rossetti and Burgardt knew on March 23, 1984 that federal law required prior Federal Home Loan Bank approval of the Park Glen transaction and no such approval had been sought or obtained.

125. At his criminal trial in California, Mandel testified that he had met with two attorneys of the Salt Lake City law firm of Van Cott, Bagley, Cornwall & McCarthy prior to the board meeting of March 23, 1984. In that trial testimony Mandel claimed that he had advised the Board of Directors of State Savings at this March 23rd meeting concerning what these lawyers had advised him as to the three steps necessary for the State Savings Board of Directors to approve the transaction. Mandel also testified at the criminal trial that at this same meeting he had conveyed other information to the Board as to advice that the Van Cott firm members had given him about Home Loan board approval. In fact, Mandel had never discussed these matters with the Van Cott attorneys prior to the March 23, 1984 board meeting and no attorney from the Van Cott firm had ever met with Mandel until April of 1984.

126. Contrary to what Mandel and Burgardt have claimed, there was no discussion at the State Savings Board of Directors Meeting on March 23, 1984 concerning the requirement of

Federal Home Loan Bank approval. Further, Wilkinson was not advised at that meeting that the $10,000,000.00 wire transfer had already been made.

127. After discussion of the Park Glen transaction at the March 23, 1984 meeting, Rossetti and Wilkinson voted to proceed. Mandel abstained from the vote at that meeting. Nevertheless, he participated thereafter in readying the transaction for closing. Both Mandel and Burgardt knew the transaction would close on March 30, 1984 and that the required prior Federal Home Loan Bank approval had not been sought or obtained. Mandel knew that at this closing that title to Park Glen would pass from Empire to State Savings and that two loans encumbered the Park Glen property in an amount of $16,500,000.00. These were from the Bank of the West and Gibraltar Savings and were to be paid off at the time of closing. Mandel had known about these two loans totaling $16,500,000.00 since January 31, 1984 and he had not attempted to find out when they were due. He also well knew throughout this period of time that these loans were not obligations of State Savings.

128. On March 30, 1984, Burgardt closed the Park Glen transaction without disclosure to or prior approval by the Federal Home Loan Bank. The transaction closed pursuant to a Purchase and Sale Agreement which contained a purchase price of $55,700,000.00. Kambe executed the Purchase and Sale Agreement on behalf of Empire not knowing why the purchase price had increased $5,700,000.00 from the January 31, 1984 agreement he had also signed. Neither Mandel nor Burgardt included a provision in the final Purchase and Sale Agreement that would have required Federal Home Loan Bank approval or that if the transaction were not approved, the money would be

refunded. Both Mandel and Burgardt knew on March 30, 1984 that such a provision was required.

129. On the date of closing, State Savings transferred an additional $11,500,000.00 to Transamerica Title Insurance Company, the escrow agent for the transaction. State Savings also borrowed $5,000,000.00 from Valley Federal Savings and Loan and these funds were also deposited with the escrow agent. Both Mandel and Burgardt knew at the time that the Board of Directors had not authorized the borrowing of $5,000,000.00 from Valley Federal to close the loan. From the escrow, Transamerica paid on March 30, 1984 $9,532,062.48 to Bank of the West and $6,082,595.00 to Gibraltar Savings and Loan Association. Oldenburg had earlier guaranteed those two loans personally. At closing, an additional $562,664.95 was also paid directly to IMI without explanation.

130. On the same date as the closing, March 30, 1984, Morris telephoned Rossetti to discuss regulatory concerns arising out of the examination of State Savings. He did this because he had received a report on March 28, 1984 from a representative of the Nevada Gaming Commission concerning State Savings' possible involvement in a large land transaction. Also on this same date, Morris advised Rossetti of a letter of that date that was being sent by Morris to the State Savings Board of Directors and Morris read this letter to Rossetti over the telephone. In pertinent part the letter advised that State Savings was not to enter into any loan or real estate transaction in which any affiliated person of State Savings was a party until net worth requirement compliance had been achieved. The letter further stated that State Savings was to assure the Federal Home Loan Bank Board that such directive would be complied with. Finally, and in this telephone conversation, Rossetti and Morris acknowledged that there

should be a meeting and a tentative meeting was set to be held in Seattle on the following Monday, April 2, 1984, and provided that Oldenburg could attend the meeting.

131. On April 2, 1984 Rossetti, Oldenburg, Muccino and Mandel traveled to Seattle on the IMI jet. On the trip to Seattle there was considerable discussion among these four as to what the regulators in Seattle should be told concerning the Park Glen transaction. Oldenburg advised Rossetti, Muccino and Mandel that it should not be revealed to the regulators that the Park Glen transaction had closed. The discussion among the four included plans to deliberately conceal from the federal regulators the true status of the Park Glen transaction. In fact, and at the meeting in Seattle on April 2, 1984, none of Rossetti, Oldenburg, Muccino or Mandel disclosed to the regulators the true status of the Park Glen transaction. Rather, the discussion, principally by Rossetti, talked about a future possible transaction involving Park Glen. At this meeting the federal regulators made clear to Rossetti, Oldenburg, Muccino and Mandel that any such affiliated transaction would require the prior written approval of the Federal Home Loan Bank. In response, the regulators at this meeting were told that no transaction would occur without such approval and no disclosure was made by any of the four representatives of State Savings concerning the previous cash payments or the fact that State Savings had already acquired title to Park Glen.

132. By the date of this meeting on April 2, 1984, State Savings, through the complicity, among others, of Oldenburg and Mandel, had already transferred $26,500,000.00 in cash for the benefit of Oldenburg and IMI. This was done with the full knowledge on the part of Oldenburg and Mandel, among others, that State Savings was not legally authorized to enter into such

transactions. The transfer of the $26,500,000.00 from State Savings for Oldenburg and IMI's benefit was perpetrated by Oldenburg and Mandel, among others, with the intent to deceive and defraud State Savings inasmuch as any person in their situation and with their knowledge of the circumstances at the time would have known serious financial harm would be caused to State Savings as the result of their fraudulent conduct. Further, this transfer was perpetrated by Oldenburg and Mandel, among others, with the intent to deceive and defraud the federal and state regulators who were acting to protect the interests of State Savings and the public. The result of this false and fraudulent activity on the part of Oldenburg and Mandel, among others, was to damage State Savings in the amount of $22,000,000.00.

133. A short time after the April 2, 1984 meeting, a State of Utah regulator discovered evidence that State Savings had made some large transfers of money and this caused the federal examiners to again request information. Rossetti advised that such would be provided no later than April 16, 1984. However, on that date Rossetti again did not furnish the correct information. Two days following and on April 18, 1984 Morris spoke by telephone with Oldenburg once and with Rossetti twice. In his telephone conversation with Oldenburg, Morris told Oldenburg of his concern about the $21,000,000.00 wire transfer from State Savings to purchase Park Glen. Morris advised Oldenburg that he had no details about this and Oldenburg claimed to him that everything was legitimate and that Rossetti would call Morris with the details within a short time. Shortly following, Rossetti telephoned Morris and claimed to Morris that the requested information had not been supplied to the Federal disclose in this conversation with Morris that State Savings had title to the Park Glen property. Upon hearing this, Morris asked him how State Savings could purchase property from an affiliated person

without approval from the Federal Home Loan Bank. Rossetti acknowledged that State Savings couldn't do this but that nevertheless it had done it. Rossetti claimed in this conversation to Morris that the $21,000,000.00 in wire transfers had been placed in escrow and could be returned to State Savings if the transaction was not approved by the Federal Home Loan Bank Board. After hearing all of this, Morris advised Rossetti that the regulators would not approve the transaction and that State Savings would have to reverse the transaction. In fact, much of what Rossetti and Oldenburg told Morris during these telephone conversations was false and they knew it was false at the time they told it to Morris. Rossetti's claim that the $21,000,000.00 in wire transfers was in escrow was false inasmuch as State Savings had transferred the initial $10,000,000.00 directly to IMI's bank account in San Francisco and the money had been expended either on or about January 31, 1984. Moreover, the transfer of $11,500,000.00 had been transferred on March 30, 1984 and the escrow agent had disbursed all of that amount from the escrow on that same date.

135. False information continued to be supplied to the federal regulators after April 18, 1984 and even though the regulators were learning some of the details of the Park Glen transaction without any help from the defendants. On April 19, 1984, Burgardt wrote Morris and falsely advised Morris that the transaction had been accomplished to resolve a problem of net worth requirement and that Park Glen, which was appraised for $85,000,000.00, had been transferred to State Savings for a purchase price of $41,000,000.00. This representation by Burgardt concerning the appraisal for $85,000,000.00 was false inasmuch as Park Glen had never been appraised as raw land for $85,000,000.00 and any appraisals approaching that amount stated within them that the appraisal was based on the assumption

that the contemplated improvements were already in place. In fact, such contemplated improvements were not in place as was well known to all of the directors of State Savings. Burgardt's letter was additionally false in that he claimed the purchase price paid by State Savings to Empire was $41,000,000.00 when the Purchase and Sale Agreement used at the closing identified it as being $55,700,000.00. Finally, Burgardt had stated in this letter to Morris that State Savings had entered into an escrow to sell the property for $57,000,000.00 and this was false.

136. On April 18, 1984, Rossetti had written Morris another letter which included a copy of his April 18, 1984 memorandum to another federal regulator. This communication also contained falsehoods. In the enclosed copy of letter Rossetti claimed that State Savings had resold the property to another development company and State Savings had an anticipated profit of approximately $15,000,000.00 to $16,000,000.00 which would significantly increase the net worth of State Savings. These statements were false.

137. On April 19, 1984, Morris wrote to State Savings Board of Directors directing them to reverse the Park Glen transaction. Having read that letter, Mandel, on April 24, 1984, wrote to Morris as IMI's senior vice-president/corporate counsel. In this letter Mandel advised Morris that the Park Glen transaction had been approved in advance by a resolution duly adopted with full disclosure by a majority of the Board of Directors with no director voting who had an interest in the transaction. This was false and fraudulent in that in fact $10,000,000.00 had been wire transferred by State Savings to IMI before any legitimate board meeting of State Savings had considered the transaction. Moreover, this was further false in that full disclosure had not been made to Wilkinson of the scope

or status of the Park Glen transaction at the March 23, 1984 Board of Directors Meeting.

138. Subsequent to April 12, 1985, FSLIC, as receiver for State Savings was able to sell the Park Glen property for $4,500,000.00. The closing at that amount occurred on July 18, 1988.

139. On October 11, 1989, Rossetti pled guilty to Counts I, II, VI and VII of the January 27, 1989 indictment handed down by the grand jury for the United States District Court, Northern District of California. By pleading guilty to Count I of the indictment, Rossetti admitted that he knowingly conspired to "willfully misapply and cause to be misapplied monies, funds, and credits belonging and entrusted to the care, custody and control of State Savings . . . with the intent to injure and defraud said State Savings . . . ." By pleading guilty to Count II of the indictment, Rossetti admitted that he, "with the intent to injure and defraud State Savings, did willfully misapply and cause to be misapplied monies, funds, and credits belonging to and entrusted to the care of State Savings . . . by authorizing and approving the purchase of the Park Glen property . . . ." By pleading guilty to Counts VI and VII of the indictment, Rossetti admitted that, in furtherance of the fraud and with the intent to injure State savings, he caused and directed the transfer of approximately $10,000,000.00 from State Savings to Security Pacific Bank in San Francisco, California, for the benefit of IMI on January 31, 1984, and was responsible for an additional transfer of $11,500,000.00 on March 30, 1984. In fact, the evidence amply indicates that Rossetti was guilty of the crimes he pled to including having the requisite intent.

140. During the period from February 6, 1981 through

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February 5, 1984, State Savings was the insured under the terms of a Savings and Loan Blanket Bond issued by defendant MGIC Indemnity Corporation.

141. During the period from February 6, 1984, through October 15, 1984, State Savings was the insured under the terms of a Savings and Loan Blanket Bond issued by defendant American Casualty.

143. Plaintiff has established not only that Rossetti acted dishonestly within the meaning of the bonds, but also that a loss was sustained by reason of his acts and was discovered during the term of the American Casualty bond and that another loss was sustained by reason of his acts which was discovered during the term of the MGIC bond.

144. Pursuant to the terms of the respective bonds, on April 19, 1985, plaintiff provided notice of loss to MGIC and American Casualty.

145. Pursuant to the terms of the bonds, plaintiff provided MGIC and American Casualty with proof of loss on October 21, 1985.

146. From April 19, 1985 through the end of Stevenson's tenure as its Chief Managing Officer, FLSLIC as receiver of State Savings, received no request from CNA or MGIC for information regarding the claims asserted under either bond.

147. Defendants MGIC and American Casualty have not shown that they were prejudiced by late notice in their ability to investigate, settle or defend the claims at issue.

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148. On or about May 7, 1984, CNA/American Casualty learned, through a *Wall Street Journal* article, that regulatory authorities were scrutinizing the Park Glen transaction.

149. On or about June 8, 1984, further information concerning the Park Glen transaction, set forth in a *Wall Street Journal* article, came to the attention of CNA/American Casualty.

150. MGIC and CNA/American Casualty performed no independent investigation at that time to determine whether a covered loss within the meaning of the respective bonds had been sustained by State Savings.

151. On the same date as the second *Wall Street Journal* article, CNA purported to cancel the MGIC bond, Savings and Loan Blanket Bon No. F2-000468, for which it had assumed claims responsibility.

152. On July 2, 1984, CNA/American Casualty issued a Savings and Loan Blanket Bond to State Savings. According to the face page of the policy, its effective date was February 6, 1984.

153. Three days later, on July 5, 1984, CNA/American Casualty issued a premium invoice to State Savings in the amount of $23,363.10 for coverage from February 6, 1984 to February 6, 1985.

154. By letter dated September 5, 1984, CNA/American Casualty notified State Savings of cancellation of the CNA/American Casualty bond effective September 15, 1984.

155. By letter dated September 19, 1984, CNA/American Casualty advised State Savings that cancellation of the CNA/American Casualty bond was to be effective as of October 15, 1984.

156. On or about April 2, 1986, CNA/American Casualty refunded to State Savings, *pro rata,* the portion of its premium representing payment for coverage beyond the cancellation date of October 15, 1984.

157. CNA has not shown that a person not in collusion with Rossetti learned of Rossetti's dishonest conduct prior to March 30, 1984.

From the foregoing Findings of Fact, the court enters the following

CONCLUSIONS OF LAW

1. This court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1131, 1132 and 1345, as well as 12 U.S.C. §§ 1725(c)(4) and 1730(k)(1). Also, venue is properly laid in this court.

2. Oldenburg was negligent in the manner in which he transacted the four IMI loans relating to the Brickyard, Mt. Crested Butte, Peregrine Village and the Decathlon Club and at the time of the transactions relating to these four loans he was acting as the agent of IMI, Landfund and Empire. Hence, his negligence is imputed to them. As a result of these loans, State Savings suffered damage in the total amount of $13,746,764.58 and plaintiff is therefore entitled to a judgment, without prejudgment interest against those defendants for that amount.

3. Any negligence on the part of Mandel relating to the Brickyard, Mt. Crested Butte, Peregrine Village and the Decathlon Club loans was not the cause of any loss sustained by State Savings and Mandel is entitled to a judgment of no cause of action on plaintiff's claims against him relating to these four loans.

4. Fraud is committed when a person acting with intent to deceive or in reckless and wanton disregard of the rights of others acts for the purpose of defrauding another and inducing another in reliance thereon to part with some valuable thing. Fraud may be committed by omission to state material facts where a duty exists to state those facts as well as by making misrepresentations of material facts. Fraudulent acts as well as fraudulent intent may be proven by circumstantial evidence and by legitimate inferences arising therefrom which show the fraudulent intent with which the party acted. In an action such as this, fraud and conspiracy to commit fraud may be proven by a preponderance of the evidence and do not require proof by clear and convincing evidence.

5. When two or more persons are jointly engaged in a fraud or have conspired to defraud, the fraudulent misrepresentations, acts, or omissions are attributed to all involved. The acts of co-conspirators are attributable to all members of the conspiracy when committed during the course of and in furtherance of the conspiracy. All conspirators are jointly liable for the acts of their co-conspirators.

6. A conspiracy is the combination of two or more persons acting in concert either to commit an unlawful act or commit a lawful act by unlawful means. A conspiracy may be implied by a course of conduct and other circumstantial evidence.

Appendix D

7. Oldenburg, Mandel, Rossetti, and Burgardt conspired to defraud and defrauded State Savings by knowingly and intentionally expropriating $26,500,000.00 of State Savings' money from the institution in violation of federal and state law.

8. In furtherance of their conspiracy to defraud, defendants Oldenburg, Mandel, Rossetti, and Burgardt embarked upon a course of conduct to conceal the transaction from the only outside director of State Savings, Wilkinson, and from the federal and state regulatory authorities until such transaction had been consummated and the $26,500,000.00 derived therefrom distributed to and expended by or for the benefit of IMI and Oldenburg.

9. As a result of this fraud and the conspiracy to defraud, State Savings suffered damages in the amount of $22,000,000.00.

10. An insurer must show that it was materially prejudiced by the insured's failure to file a timely proof of loss before an insurer can avoid coverage on that basis. MGIC and CNA (American Casualty) have failed to prove that they were so prejudiced.

11. CNA (American Casualty) has failed to demonstrate that a person not in collusion with Rossetti learned of his dishonest acts so as to trigger automatic termination of the policy as to him.

12. Even if the court had found that there was no coverage under the CNA (American Casualty) bond by reason of termination as to Rossetti, plaintiff has shown that Burgardt, an employee of State Savings' acted fraudulently and dishonestly with the requisite intent required by the bond and that State

Savings was thereby caused to sustain loss on March 30, 1984 in the amount of $16,500,000.00 on that date.

13. Said loss on March 30, 1984 was discovered at the latest at the time of the issuance of cease and desist orders by plaintiff and the Utah Department of Financial Institutions on June 1, 1984 and June 24, 1984.

14. Plaintiff has established entitlement to recovery against both the MGIC and CNA (American Casualty) bonds and is entitled to judgment on both bonds and against the respective issuers thereof in the amount of $3,000,000.00 on each bond, or a total of $6,000,000.00.

15. Plaintiff is not entitled to recover pre-judgment interest on said bonds although interest will accrue on said amount from and after the date of judgment as provided for in 28 U.S.C. § 1961.

16. Plaintiff is entitled to recover a judgment against defendants Oldenburg, IMI, Landfund, and Empire for their negligence on the four IMI loans in the total amount of $13,746.764.58.

17. Plaintiff is entitled to recover judgment against defendants Oldenburg, Mandel, and Burgardt for their fraud and their conspiracy to defraud State Savings in connection with the Park Glen transaction in the total amount of $22,000,000.00.

18. Defendant Mandel has filed a motion to strike and to enforce settlement agreement contending that the settlement between Federal Insurance Company and plaintiff bars any claims by plaintiff against him based on fraud or conspiracy to

defraud relating to the Park Glen transaction. The court has reviewed the memoranda and other materials in the record pertinent to this motion and issue. Based thereon, the court concludes that the settlement between Federal Insurance Company and plaintiff does not bar plaintiff's claims against defendant Mandel based on fraud or conspiracy to defraud and relating to the Park Glen transaction. Moreover, the court rejects defendant Mandel's contention that the fraud proven must be proved by clear and convincing evidence. It is sufficient if it is proved by a preponderance of the evidence and such burden of proof has been met by plaintiff in this case. Accordingly, defendant's motion to strike and to enforce settlement agreement is denied.

19. The post-trial brief of MGIC and American Casualty Company has advised that although MGIC issued the first of the two bonds in issue, all obligations under that bond became the obligations of American Casualty as of November 1983. Consequently, any liability under both the first or second bond is the obligation of American Casualty. Accordingly, only that company is named in the judgment as it relates to the liability on the fidelity bonds.

Dated this 26th day of February, 1991.

s/ David K. Winder
David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 26th day of February, 1991.

Appendix D

Herschel J. Saperstein, Esq.
Glen E. Davies, Esq.
310 South Main, Suite 1200
Salt Lake City, Utah 84101-2171

John R. Gall, Esq.
David W. Alexander, Esq.
BancOhio National Plaza
155 East Broad Street, 14th Floor
Columbus, Ohio 43215

Merlin O. Baker, Esq.
Jonathan A. Dibble, Esq.
P. O. Box 45385
Salt Lake City, Utah 84145-0385

Henry F. Field, Esq.
Steven H. Mora, Esq.
333 W. Wacker Drive, Suite 500
Chicago, Illinois 60606

(2)

Supreme Court, U.S.
FILED
SEP 5 1995
OFFICE OF THE CLERK

No. 95-16

In the Supreme Court of the United States

OCTOBER TERM, 1995

MARTIN L. MANDEL, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
JOHN P. PARKER
Attorneys
Federal Deposit Insurance Corporation
Washington, D.C. 20429

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner had waived his contention that the district court applied an incorrect burden of proof.

2. Whether, in a civil suit brought by the FDIC to recover damages caused by petitioner in his capacity as director of a failed savings and loan institution, petitioner was entitled to raise state-law affirmative defenses of failure to mitigate damages and contributory negligence by the FDIC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-14a) is reported at 38 F.3d 1119. The findings of fact and conclusions of law of the district court (Pet. App. 15a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1994. A petition for rehearing was denied on February 1, 1995. Pet. App. 3a-6a. On April 17, 1995, Justice Breyer entered an order extending the time within which to file a petition for a writ of

certiorari to and including June 30, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of petitioner's actions as a member of the board of directors of State Savings and Loan Association of Utah (State Savings), a federally insured savings and loan institution, between October 28, 1983, and June 6, 1984. During that time, petitioner was senior vice president and counsel of Investment Mortgage International (IMI), which provided financing for real estate development projects. He was also involved in the management of Empire State West (Empire), which developed real estate. Pet. App. 18a-19a. At the relevant times, State Savings, IMI, and Empire were all owned and controlled by J. William Oldenburg. *Id.* at 18a.

During the fall of 1983, IMI undertook to obtain $50,000,000 in financing for the initial phase of the development, by Empire, of property known as Park Glen. At that time, IMI's financial condition was rapidly deteriorating due to extravagant expenditures, and IMI urgently needed $10,000,000 to continue operations. Pet. App. 44a-45a, 49a. The chief financial officer of IMI attempted to borrow $10,000,000 from State Savings, but he was rebuffed by the bank's president, who told him that the loan would be illegal because of Oldenburg's relationship to both entities. *Id.* at 45a. State Savings's officers and directors agreed, however, to purchase something from Oldenburg or his entities for the purpose of channeling the needed funds to IMI, and petitioner, Oldenburg, and other managers of IMI concluded that

selling the Park Glen property would provide the necessary infusion of cash. *Id.* at 46a.

Accordingly, on January 31, 1984, State Savings entered into a contract with Empire to purchase Park Glen for $50,000,000. Pet. App. 44a, 48a. Petitioner drafted the purchase agreement for Park Glen on behalf of Empire. *Id.* at 48a. At the time, petitioner knew that the transaction was being used as a vehicle to get money to IMI, that the fair market value of the Park Glen property at its then-current use (undeveloped land) was only about $4,110,000, and that the approval of the Federal Home Loan Bank Board (FHLBB) was required for the related-party transaction. *Id.* at 44a-49a. Nonetheless, at the next regular meeting of State Savings's board of directors, held on March 23, 1984, at which the board was asked to ratify the transaction, petitioner either did not disclose or deliberately misrepresented material facts to Bryan Wilkinson, State Savings's only outside director, before Wilkinson voted to approve the Park Glen transaction. *Id.* at 51a-54a. In addition, on March 30, 1984, the day that the Park Glen transaction closed, petitioner knew that approval for the transaction from the FHLBB had not been sought or obtained, and that the purchase and sale agreement did not include a required provision, that the price would be refunded if FHLBB approval was not obtained. *Id.* at 50a-51a, 54a.

On April 12, 1985, the FLHBB appointed the Federal Savings and Loan Insurance Corporation (FSLIC) receiver of State Savings, due to the bank's insolvency. FSLIC, as receiver, then assigned all of State Savings's claims against its former directors, officers, controlling persons, employees and share-

holders to FSLIC, in its corporate capacity. Pet. App. 17a. The Federal Deposit Insurance Corporation (FDIC) was subsequently substituted for FSLIC as receiver of State Savings.[1]

2. The FDIC brought suit against petitioner, Oldenburg, and other directors of State Savings, seeking recovery of damages sustained as a result of their fraud and negligence in the operation of the bank. After a bench trial, the district court found that State Savings had deliberately paid an inflated price for the Park Glen property to help Oldenburg generate money for his other companies. The court found that Oldenburg, petitioner, and others had conspired to defraud, and had defrauded, State Savings of $26,500,000, and had embarked on a course of conduct to conceal the true facts about the Park Glen transaction from Wilkinson until the transaction was consummated and the $26,500,000 derived from the transaction was distributed to IMI and Oldenburg. The court also found that State Savings had suffered damages in the amount of $22,000,0000 as a result of the conspiracy and the fraud. Pet. App. 65a.[2] The court therefore concluded that FDIC was entitled to recover $22,000,000 from the conspirators. *Id.* at 66a.

---

[1] Pursuant to the Financial Institutions Reform, Recovery and Enhancement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, all assets of FSLIC were transferred to the FSLIC Resolution Fund, which is managed by the FDIC. § 215, 103 Stat. 252 (to be codified at 12 U.S.C. 11A(a)). The FDIC, in its capacity as manager of the FSLIC Resolution Fund, was substituted as the plaintiff in this case.

[2] Although the purchase price for the Park Glen property was $50,000,000, $26,500,000 was actually transferred from State Savings to Oldenburg's other entities. Pet. App. 56a-57a. FSLIC was able to sell the property for $4,500,000. *Id.* at 60a.

In reaching its decision on the fraud claim, the district court held that FSLIC was required to demonstrate fraud by a preponderance of the evidence, rather than by clear and convincing evidence. Pet. App. 9a, 67a. The court also held that petitioner could not raise defenses based on the conduct of the receiver in liquidating the assets of the receivership estate, and it therefore excluded evidence proffered by petitioner that the value of the Park Glen property had deteriorated while it was a receivership asset. *Id.* at 10a.

3. The court of appeals affirmed. Pet. App. 7a-14a. The court first ruled that petitioner had waived his contention that the district court erred by applying the preponderance of the evidence standard to the FDIC's fraud claim. *Id.* at 9a. The court concluded that petitioner had not proposed an alternative standard of proof to the district court, had not contested the district court's reliance on the preponderance standard, and had mentioned the issue below only in a separate and distinct context. *Ibid.*

The court of appeals also agreed with the district court that officers and directors of a failed financial institution may not assert state-law defenses of contributory negligence and mitigation of damages against the FDIC, when the FDIC is suing to recover losses sustained by the bank. Pet. App. 10a-11a. Agreeing with "[t]he two circuit courts which have directly addressed this issue," *id.* at 11a, the court concluded that the FDIC "has no duty first to attempt to mitigate the damages attributed to [the former officers and directors] by seeking other, and perhaps less sure, avenues of relief," and it reasoned that "excepting the FDIC from such affirmative defenses

is consonant with the discretionary function exception" to the Federal Tort Claims Act. *Ibid.* The court also remarked that "nothing could be more paradoxical or contrary to sound policy than to hold that it is the public [that] must bear the risk of errors of judgment made by [FDIC] officials in attempting to save a failing institution—a risk which would never have been created but for defendants' wrongdoing in the first instance." *Id.* at 12a.

ARGUMENT

1. Petitioner contends (Pet. 7-15) that, under *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994), the district court was required to apply the clear and convincing evidence standard of Utah law to the FDIC's fraud claim in this case. The court of appeals concluded, however, that petitioner had waived that contention by failing to present it to the district court. That conclusion presents no significant issue of law warranting this Court's review.

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). While the courts of appeals do have limited discretion to consider issues not properly preserved for appeal, "as where the proper resolution is beyond any doubt, * * * or where 'injustice might otherwise result,'" *id.* at 121, this Court has not suggested that the courts of appeals must always consider an appellant's contentions about the proper burden of proof, when the arguments could have been, but were not, raised in the district court. Although petitioner contends that other courts of appeals would consider the burden of proof issue for the first time on appeal (see Pet. 12-14), this Court has stated that "[t]he

matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton*, 428 U.S. at 121. There is no "general rule" requiring the courts of appeals to take up particular issues for the first time on appeal. *Ibid.*

The court of appeals did not abuse its discretion in deciding that this was not one of the rare cases in which a miscarriage of justice would result if an issue were not heard for the first time on appeal. Petitioner had ample opportunity to raise the burden of proof issue in the district court but failed to do so. Nor does petitioner contend that he was surprised by unforeseen developments in the law. Further review of his arguments about the burden of proof is therefore unwarranted.

2. Petitioner also contends (Pet. 15-19) that the court of appeals erred in concluding that he was not entitled to raise state-law defenses arising out of the FDIC's failure to mitigate the damages resulting from petitioner's wrongful acts and its contributory negligence in its handling of the Park Glen property. He argues that the decision below conflicts with *O'Melveny & Myers* and also with the decision of the Fifth Circuit in *FDIC* v. *Massingill*, 30 F.3d 601 (1994). Those contentions are incorrect.

In *O'Melveny & Myers*, the Court held that state law, rather than federal common law, provides the rule of decision governing the imputation of facts known to insiders of a failed bank to the FDIC when the FDIC sues as receiver of the bank. The Court held that state law supplied the rule of decision applicable to "FDIC's rights and liabilities, as re-

ceiver, with respect to the primary conduct on the part of private actors that has already occurred," but it also observed that the controversy did not involve "the primary conduct of the United States or any of its agents or contractors." 114 S. Ct. at 2055. *O'Melveny & Myers* does not control this case, in which petitioner contends that the FDIC's own actions, after it took control of the bank, should be governed by state law.

The court of appeals agreed with two other circuits that the federal law governing the FDIC's post-receivership conduct in disposing of property owned by the failed bank precludes the assertion of defenses of mitigation of damages and contributory negligence based on that conduct. See *FDIC* v. *Mijalis*, 15 F.3d 1314 (5th Cir. 1994); *FDIC* v. *Bierman*, 2 F.3d 1424 (7th Cir. 1993). As the Seventh Circuit reasoned in *Bierman*:

> It is the duty of the FDIC to manage [a failed bank's] assets in order to replenish the insurance fund that has been used to cover the losses allegedly caused by the directors and officers. When the FDIC undertakes this task, it must act in the public interest. * * * Congress has made it clear that the FDIC is to exercise its discretion in choosing a course of action in its efforts to replenish the fund. * * * [The FDIC] has no duty first to attempt to mitigate the damages attributed to [directors and officers] by seeking other, and perhaps less sure, avenues of relief.

2 F.3d at 1439-1440.

Petitioner relies on *Massingill*, *supra*, but that case concerned the defense of impairment of collateral, not the defense of mitigation of damages. In

Massingill, the Fifth Circuit held that the defendant in that case, who was a co-maker of promissory notes held by a failed bank, could raise a state-law defense of impairment of collateral against the FDIC. The court did not even mention, let alone overturn, its prior decision in *Mijalis*, in which it addressed the different issue presented in this case and adopted the Seventh Circuit's reasoning in *Bierman*. Moreover, since *Massingill* was decided, at least two district courts in the Fifth Circuit have followed *Mijalis* and have held that federal law precludes a defense of mitigation of damages in suits like this one. *RTC* v. *Sands*, 863 F. Supp. 365, 372 (N.D. Tex. 1994) ("[T]he panel [in *Massingill*] ultimately rested its conclusion upon the facts before it * * * and did not purport to hold generally that *O'Melveny & Myers* had superseded the rationale of *Mijalis*."), aff'd mem., 59 F.3d 1241 (5th Cir. 1995) (Table); *FDIC* v. *Schreinder*, No. SA-93-674 (W.D. Tex. Feb. 16, 1995); see also *RTC* v. *Bright*, 157 F.R.D. 397, 401 (N.D. Tex. 1994). There is therefore no conflict between the decision below and decisions of the Fifth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
JOHN P. PARKER
Attorneys
Federal Deposit Insurance Corporation

SEPTEMBER 1995

No. 95-16

(3)

Supreme Court, U.S.
FILED
SEP 8 1995
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In The

Supreme Court of the United States

October Term, 1995

MARTIN L. MANDEL,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CAPACITY AS MANAGER OF THE FSLIC RESOLUTION FUND, STATUTORY SUCCESSOR TO FSLIC IN ITS CORPORATE CAPACITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

NEIL A. KAPLAN
Counsel of Record
CLYDE, SNOW & SWENSON
201 South Main, Suite 1000
Salt Lake City, Utah 84111-2208
(801) 322-2516

VICTOR SIMON
10409 Mannakee Streeet
Kensington, MD 20895-2927
(301) 942-4005

Attorneys for Petitioner

7018
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT CONSIDERED THE ISSUE OF THE BURDEN OF PROOF WHICH PETITIONER RAISED AT THE EARLIEST POSSIBLE MOMENT.

Respondent suggests that Petitioner had ample opportunity to raise the burden of proof issue in the District Court but failed to do so. Respondent further suggests that Petitioner does not contend that he was surprised by unforeseen developments in the law. These contentions are simply incorrect. As pointed out in the Petition, the issue was squarely raised and, in fact, the District Court, in Conclusion of Law 18, specifically noted that "[t]he Court rejects defendant Mandel's contention that the fraud proven must be proved by clear and convincing evidence. It is sufficient if it is proved by a preponderance of the evidence and such burden of proof has been met by [the FDIC] in this case." (*See* Pet. at 8.)

While Petitioner did contend that the Utah standard of clear and convincing should apply, in reality the burden of proof was not an issue in the District Court. Specifically, the FDIC never contended in the District Court that the applicable standard should be anything other than the Utah standard of clear and convincing evidence. By contrast, the District Court for the first time in its Findings of Fact and Conclusions of Law announced a departure from the well-settled rule regarding the burden of proof for state common law fraud claims and applied a federal common law standard. The District Court's error was promptly raised as an issue on appeal. During the pendency of the appeal, Petitioner also brought to the attention of the Court of Appeals this Court's decision in *O'Melveny & Meyers v. FDIC*, 114 S. Ct. 2048 (1994) — a decision the Court of Appeals nevertheless chose to ignore.

The announcement by the District Court was clearly a surprise to Petitioner, representing an unforeseen development and a marked departure from the well-established Utah clear and convincing evidence standard to be applied to common law fraud claims. Accordingly, we urge the Court to grant the Petition for Certiorari on this issue, vacate the Judgment of the Court of Appeals and remand the case to that court for further consideration in light of this Court's decision in *O'Melveny & Meyers. See Patullo v. RTC,* 115 S. Ct. 44 (1994) (petition for certiorari granted; judgment vacated and case remanded to the court of appeals for further consideration in light of *O'Melveny*).

II.

THE APPLICATION OF THE WRONG BURDEN OF PROOF RESULTS IN A GROSS MISCARRIAGE OF JUSTICE.

Respondent asserts that the Court of Appeals' conclusion that Petitioner waived the burden of proof issue by failing to present it perfectly to the District Court presents no significant issue of law warranting this Court's review. As Respondent concedes, the Court of Appeals and this Court may consider issues whether properly preserved or not when the resolution is beyond any doubt or where injustice might otherwise result. One can only fantasize as to what case would fit within Respondent's concept of a miscarriage of justice if the application of the wrong burden of proof is not such a case. There is nothing more basic to our concepts of fundamental due process than the correct burden of proof. And, in this case, under *O'Melveny* it is beyond any doubt that the state law burden of proof should have been applied.

III.

A CONFLICT DOES EXIST AMONG THE CIRCUITS ON THE AVAILABILITY OF STATE LAW AFFIRMATIVE DEFENSES.

Respondent cites *FDIC v. Mijalis,* 15 F.3d 1314, 1323-24 (5th Cir. 1994) and *FDIC v. Bierman,* 2 F.3d 1424, 1438-41 (7th Cir. 1993), for the proposition that the Circuits are unanimous in holding that, under federal common law, in an action by the FDIC against a director of a failed institution, the director cannot raise the defense that the FDIC failed to mitigate damages.

The decision in *Mijalis, however, has recently been* under reconsideration by the Fifth Circuit. The Fifth Circuit, in light of this Court's decision in *O'Melveny,* granted a petition for interlocutory appeal on the question: "What affirmative defenses may be asserted by former directors and officers of a failed bank against the FDIC . . . in light of the Supreme Court's decision in *O'Melveny & Meyers v. FDIC*". *FDIC v. Schreinder,* No. 95-46 (5th Cir. April 13, 1995) (permitting appeal of *FDIC v. Schreinder,* 1995 WL 379963 (W.D. Tex. February 16, 1995)). Although *Schreinder* was settled in June 1995, the same issue was raised in a recent motion for certification of an interlocutory appeal filed by directors sued by the Resolution Trust Corporation ("RTC) in another Western District of Texas case, *RTC v. Hays,* No. SA-92-CA-0653 (W.D. Tex. Aug. 1, 1995) (defendants' request for certification of interlocutory appeal). Contrary to Respondent's assertion, the Fifth Circuit has not affirmed the District Court's opinion in *RTC v. Sands,* 863 F. Supp. 365 , 372 (N.D. Tex. 1964) relative to affirmative defenses. The cited opinion has not been appealed and, consequently, the Fifth Circuit has not yet addressed it.

Since this Court's decision in *O'Melveny,* the issue of a

defendant's ability to raise the defense of mitigation of damages against the FDIC has been addressed by three of the Circuits with a split among the Circuits as to the proper result. The majority reached the conclusion that when the FDIC, as receiver of a failed institution, brings an action under state law, applicable defenses are to be determined under state law. The Tenth Circuit, in the ruling below, is the only Circuit to deny the assertion of available state law defenses. Of note, is the fact that the Tenth Circuit did not mention *O'Melveny* in refusing to allow Petitioner to raise the affirmative defense of mitigation of damages against the FDIC. The Fifth Circuit in *Schreinder, supra,* has has agreed to examine the issue in light of *O'Melveny,* and in *FDIC v. Massingill,* 30 F.3d 601, 603-04 (5th Cir. 1994), that court held that the available defenses raised by a borrower were to be determined under applicable state law. It should be noted that in *Massingill,* the issue presented to the Fifth Circuit directly involved primary conduct of the FDIC. Likewise, the Third Circuit in *RTC v. Forest Grove, Inc.,* 33 F.3d 284, 288-91 (3rd Cir. 1994) found that available defenses were to be determined under state law.

IV.

CONTRARY TO RESPONDENT'S ASSERTION IN ITS BRIEF IN OPPOSITION, LAW DEVELOPED IN COMMERCIAL CASES IS EQUALLY APPLICABLE IN CASES AGAINST OFFICERS AND DIRECTORS.

Respondent contends in its Brief in Opposition that *Massingill, supra,* is inapposite to this case because it was not a suit against directors and because it applied mitigation principles from commercial law. This is a distinction without a difference. The distinction was not given even the barest mention by this Court in *O'Melveny,* a professional liability case, relying in part on *Coit Independence Joint Venture v. FSLIC,* 109 S. Ct. 13561 (1989), a commercial case.

Further, at least four courts of appeal have considered *O'Melveny* in a commercial context: *Massingill, supra*; *RTC v. Forest Grove, Inc., supra*; *RTC v. Maplewood Investments,* 31 F.3d 1276, 1290-91 (4th Cir. 1994) (expressing doubt as to the continued vitality of, and placing limits on, the federal common law holder in due course doctrine); and *Murphy v. FDIC,* No. 93-5268 (D.C. Cir. Aug. 1, 1995) (holding that *O'Melveny* displaced the federal common law doctrine established in *D'Oench Duhme & Co. v. FDIC,* 315 U.S. 447 (1942)).

CONCLUSION

The District Court in this case made the same error twice: inappropriately finding and applying federal common law which was markedly different from the applicable state law. On the burden of proof issue, as set forth in the Petition for a Writ of Certiorari, the Tenth Circuit refused to consider Petitioner's appeal based on a finding that Petitioner had failed to raise the issue below. As shown in the Petition, that finding is not only clearly erroneous, but flies in the face of the fundamental error doctrine of *Hormel v. Helvering,* 312 U.S. 552 (1941), and extensive jurisprudence in the lower courts on Fed. R. Civ. P. 60(b).

On the availability of state law affirmative defenses, *O'Melveny* requires the application of state law.

By granting certiorari in this case, this Court could correct the fundamental error of law and resolve the conflict between the Tenth Circuit and the Third and Fifth Circuits.

Respectfully submitted,

NEIL A. KAPLAN
Counsel of Record
CLYDE, SNOW & SWENSON
201 South Main, Suite 1000
Salt Lake City, Utah 84111-2208
(801) 322-2516

VICTOR SIMON
10409 Mannakee Street
Kensington, MD 20895-2927
(301) 942-4005

Attorneys for Petitioner